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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

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Dated: September 2, 1987

Question Presented

Whether in order to prevent the avoidance of tax by non-Indian purchasers of motor fuel from Indian retailers, the State of New York may require the Tribe's motor fuel distributor to precollect and pay over to the State the applicable motor fuel and sales taxes.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G.W. CHU, as Commissioner of Taxation and Finance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Petitioners,

against

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

The petitioners, the State Tax Commission of the State of New York, Roderick G.W. Chu, as Commissioner of Taxation and Finance of the State of New York and the

Department of Taxation and Finance of the State of New York, respectfully pray that a writ of certiorari issue to review the order of the New York State Court of Appeals entered in this action on May 7, 1987.

Opinions Below

The opinion of the Court of Appeals, which reversed the order of the Appellate Division, Third Judicial Department and remitted the case to that court for further proceedings, was rendered on May 7, 1987. The opinion is reported at 69 NY2d 536 (1987). It is set forth as Appendix "A".

The opinion of the Appellate Division was rendered on July 31, 1986. The opinion is reported at 122 AD2d 518 (3d Dept 1986). It is set forth as Appendix "B".

The opinion of the Supreme Court, Albany County, was rendered on February 25, 1986. The opinion is not reported. It is set forth as Appendix "C".

The opinion of the Appellate Division following remittance was rendered on July 16, 1987. The opinion is not yet reported. It is set forth as Appendix "D".

Jurisdiction

The order of the Court of Appeals was entered on May 7, 1987. By order dated July 28, 1987, Justice Marshall extended the time for filing a petition for a writ of certiorari to and including September 4, 1987. This petition for certiorari is filed within that time. The Court's jurisdiction to review the case rests upon 28 USC § 1257(3).

Statutory Provisions Involved

25 USC §§ 261-264; New York Tax Law §§ 282(1); 283(1), (3), (7); 284(1); 284-a; 284-c; 285-a; 286(1); 287; 289-c; 1101(b)(4)(ii); 1102; 1132(c); 1134; 1135; 1136; 1137; 1139. These provisions are set forth in pertinent part as Appendix "E".

Statement of the Case

This case involves questions pertaining to the taxation of motor fuel delivered to Indian retailers but sold to non-Indians. Broadly, Articles 12-A and 28 of the New York Tax Law impose excise and sales taxes upon motor fuel which is imported and sold within the State (Tax Law, §§ 284, 284-a, 284-c, 1101[b][4][ii], 1102 [effective June 1, 1985], 1105). In the first instance, the taxes are assessed to and collected from the distributor.[1] The distributor includes the amount of the tax in its wholesale price, and the retailer, in turn, passes the tax along to the ultimate consumer. In cases where the ultimate consumer is an Indian, or is otherwise exempt from taxation, the taxes are refunded or a credit is given (Tax Law, §§ 289-c, 1139). Thus, no direct tax is imposed upon either the distributor or the Indian retailer or purchaser, but only upon the non-Indian purchaser. As the court below stated, the burden and legal incidence of the tax falls on the non-Indian consumer (A8).[2]

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[1]The term "Distributor" is defined at section 282(1) of the Tax Law to mean "any person, firm, association or corporation, who or which imports or causes to be imported into the state for use, distribution, storage or sale within the state, any motor fuel; * * *".

[2]Numbers in parentheses preceded by the letter "A" refer to pages of the appendix.

Respondent Herzog Brothers Trucking, Inc. ("Herzog Brothers") is a Pennsylvania corporation which is engaged in the business of, among other things, the wholesale and retail sale of motor fuels. Commencing in June, 1984, Herzog Brothers began importing motor fuel into New York State and selling it at wholesale to Indian retailers on the Seneca Nation of Indians' Allegany and Cattaraugus Reservations. Although the respondents were aware of the fact that Articles 12-A and 28 of the Tax Law required wholesale distributors and vendors of motor fuels to register and file a bond with the Department of Taxation and Finance as a precondition of doing business in New York and required distributors and vendors to maintain and file records with respect to their sales of motor fuels in New York and to pay the applicable taxes (Tax Law, §§ 283, 286, 287, 1134, 1135, 1136, 1137), they refused to comply with the law in any respect.

After an audit revealed noncompliance with the Tax Law, respondents were assessed for both taxes.[3] However, prior to the completion of the administrative proceeding, and on or about November 27, 1985, the respondents commenced this action in the New York Supreme Court for declaratory, affirmative and injunctive relief. The respondents sought, in addition to injunctive relief, a declaration (1) that the application of the provisions of the New York Tax Law relating to the taxation of gasoline and motor fuel, and the regulation of distributors and vendors of such motor fuel, were unconstitutional as applied to them, and (2) that by reason of the Indian trader statutes, 25 USC §§ 261-264, the State was without power to require them to register as distributors or vendors pur-

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[3]The audit revealed that between June 1, 1984 and May 31, 1985, respondents imported and sold a total of 3,053,245 gallons of motor fuel. The total motor fuel tax due and owing for the period was $244,259.60, plus penalty of $18,161.84; the total sales and use tax owed was $234,352.08, plus interest and penalty.

suant to sections 283 and 1134 of the Tax Law or to require their compliance with the record keeping and filing provisions of Articles 12-A and 28 of the Tax Law as those provisions relate to the respondents' business.

By Order to Show Cause signed by New York Supreme Court Justice George L. Cobb on November 27, 1985, the respondents moved for a preliminary injunction seeking to enjoin the enforcement as against them of the provisions of Articles 12-A and 28 of the Tax Law. The motion was made returnable before Supreme Court Justice Lawrence E. Kahn on December 6, 1985. Justice Kahn, citing to *Central Machinery Co. v Arizona Tax Commission,* 448 US 160 (1980), ruled that the eventual success of the respondents on the merits was "manifest", and granted a preliminary injunction as requested (A23-A26). The State appealed.

In reversing, the Appellate Division concluded that the respondents had not demonstrated a clear likelihood of success on the merits, a prerequisite for a preliminary injunction, because the challenged provisions of the Tax Law did not impose taxes upon either the respondents or the Indian retailers, but merely imposed upon those entities the "minimal burden" of collecting the taxes from the non-Indian consumer. Based upon the authority of *Moe v Confederated Salish and Kootenai Tribes,* 425 US 463 (1976), and *California State Bd. of Equalization v Chemehuevi Indian Tribe,* 474 US 9 (1985), the Appellate Division concluded that such a tax scheme was permissible (A15-A17). Two justices dissented upon the ground, among others, that federal law pre-empted the application of state law to the trade relationship between reservation Indians and their suppliers (A19-A22). On appeal by permission, the Court of Appeals reversed.

The Court of Appeals held that the respondents were Indian traders within the meaning of the Indian trader statutes, 25 USC § 261, *et seq.*, and that as such the challenged provisions of law were impermissible as applied to them. The Court stated in relevant part (A14):

> "We determine that Congress has preempted the field of regulating trade with Indians on reservations and has left 'no room' for the application of supplementary state tax laws, such as the one here at issue, that impose 'additional burdens' on Indian traders (*see, Warren Trading Post Co. v Arizona Tax Com.*, 380 US 685, 690, *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is pre-empted by the federal trader laws and the Appellate Division erred, as a matter of law, in holding that plaintiffs had not established, a 'clear likelihood of success on the merits' on their application for a preliminary injunction."

Although the Court of Appeals' decision dealt only with the propriety of Special Term's grant of a preliminary injunction, and the case was remitted to the Appellate Division for further proceedings, the Court of Appeals' order sufficiently meets the finality requirements of 28 USC § 1257 to permit review by this Court. This is so because the Court of Appeals' holding with respect to the federal issue is conclusive and the outcome of further proceedings is consequently preordained. Hence, the order of the Court of Appeals is sufficiently final to permit review. *See Cox Broadcasting Corp. v Cohn*, 420 US 478 (1975).

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals is in direct conflict with the decisions of this Court approving "pass on and collect" tax schemes and raises significant issues concerning the rights of states to prevent the avoidance of tax by non-Indian purchasers of goods from Indian retailers.

Notwithstanding the approbation with which this Court has viewed "pass on and collect" tax schemes from the States of Montana and Washington, which are virtually identical to that which is at issue here, the New York Court of Appeals ruled that the Indian trader statutes, 25 USC § 261 *et seq.*, are completely pre-emptive and thus act to prohibit application of the challenged provisions of the New York tax law to respondents' dealings with the Seneca Nation. This result is in direct conflict with the holdings of this Court in *Moe v Confederated Salish and Kootenai Tribes,* 425 US 436 (1976), and *Washington v Confederated Tribes,* 447 US 134 (1980). Because the issue of whether states may employ Indian traders as one link in the chain of a "pass on and collect" tax scheme is of vital importance to those states in which Indian reservations are located, certiorari should be granted to correct the Court of Appeals' erroneous ruling.

In *Moe,* this Court upheld the right of the State of Montana to require Indian tribal sellers of cigarettes to collect a state sales tax imposed upon non-Indian purchasers of cigarettes. The tax scheme, which in this respect is exactly paralleled by that of New York, was described by the three-judge panel which first decided the case as follows, *Confederated Salish and Kootenai Tribes v Moe,* 392 F Supp 1297, 1308 (Dist of Montana, 1975):

> "By express statutory provision the taxes are 'conclusively presumed to be direct taxes on the

> retail consumer *precollected* for the purpose of convenience and facility only'. Section 84-5606(1), R.C.M. 1947. When the tax is paid by the seller it is 'considered as an advance payment and shall be added to the price of the cigarettes and recovered from the ultimate consumer or user'. *Id.* In other words, *the seller pays the tax to the wholesaler and adds it to the purchase price of the cigarettes.*'' (Emphasis supplied.)

In approving the Montana law, this Court emphasized the fact that the cigarette tax had been validly imposed and observed that without the expedient of having the retailer collect the tax from the non-Indian purchasers ''wholesale violations of the law by the latter class will go virtually unchecked'', 425 US at 483. The Court distinguished *Warren Trading Post Co. v Arizona Tax Comm'n,* 380 US 685 (1965), on the ground that the tax in that case, a gross income tax imposed on the on-reservation sales by a trader to reservation Indians, had been imposed directly on the seller, and would therefore have put additional financial burdens on the trader or the Indians with whom it dealt. 380 US at 691. This, the Court held, ''would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations''. *Id.* In contrast, the collection requirement of the Montana law was characterized by the Court as ''a minimal burden designed to avoid a likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax''. 425 US at 483. The quoted language, from *Warren Trading Post Co.,* was held not to apply. 425 US at 482.

In *Confederated Tribes,* the Court went even further, upholding a Washington State tax scheme which compelled the operators of tribal smokeshops to collect taxes

with respect to the sale of cigarettes to non-Indians and to keep detailed records of both taxable and nontaxable transactions. Significantly, although the lower court's opinion in *Confederated Tribes* makes clear that the operators of the tribal smokeshops were federally licensed Indian traders, *see, Confederated Tribes of Colville v State of Washington,* 446 F Supp 1339, 1347 (ED Wash 1978), this Court rejected out-of-hand the argument that federal Indian law, including the Indian trader statutes, pre-empted the Washington State tax scheme. The Court said, 447 US at 155:

> "We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Of perhaps even greater significance is the further holding of the Court that the State of Washington had the power to seize shipments of unstamped cigarettes traveling to the reservations from out-of-state wholesalers even though the sales by the wholesalers to the tribal businesses were concededly exempt from state taxation and no state tax was due while the cigarettes were in transit. 447 US at 161-162. This holding is in sharp contrast to the conclusion of the Court of Appeals below that the Indian trader laws in and of themselves place every transaction between an Indian tribe and its supplier beyond the regulatory authority of the states.

The Court of Appeals relied primarily upon *Central Machinery Co. v Arizona Tax Comm'n,* 448 US 160 (1980), and *Warren Trading Post Co. v Arizona Tax Comm'n,* 380 US 685 (1965), for its conclusion that federal law has pre-empted New York oversight or action against the respondents with respect to their sales of motor

fuel to the Seneca Nation. However, the nature of the tax schemes in *Central Machinery Co.* and *Warren Trading Post Co.* are wholly distinct from that of New York and these distinctions render the holdings in those cases inapposite.

In *Central Machinery Co.,* this Court ruled that the State of Arizona could not impose a tax against the seller of goods when the sale was made to a tribal enterprise on an Indian reservation. The tax in that case was a "transaction privilege tax" on the privilege of doing business in the State of Arizona. 448 US at 161-162. The amount of the tax was added as a separate item to the price of the goods sold, and was actually borne by the tribal enterprise. The Court ruled that its decision in *Warren Trading Post Co.* was controlling and held that the Indian trader statutes, 25 USC §§ 261-264, a fundamental purpose of which was "to protect Indians against prices deemed unfair or unreasonable by the Indian Commission", 448 US at 164, n. 3 quoting from *Warren Trading Post Co.,* 380 US at 691, pre-empted the asserted state tax. As we discussed above, the tax in *Warren Trading Post Co.* was also imposed against the seller and could thus have put an additional financial burden on the Indians with whom it dealt.

But the New York law, quite unlike the laws found to be improper in *Central Machinery Co.* and *Warren Trading Post Co.,* does not impose taxes upon either the distributor or the tribal enterprise. The taxes are assessed only against non-members of the tribe. As this Court made clear in *Moe* and *Confederated Tribes,* states have a legitimate governmental interest in the collection of those taxes and may employ the aid of Indian traders in doing so. The minimal burdens of prepayment and adequate record keeping required by the New York law, burdens which are reasonably designed to prevent the marketing of the Seneca's tax exemption to non-members of the tribe, are therefore proper.

CONCLUSION.

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
September 2, 1987

Respectfully submitted,

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APPENDIX A—Opinion of Court of Appeals, State of New York.

Remittitur

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Sol Wachtler, Chief Judge, Presiding

3 No. 109

HERZOG BROTHERS TRUCKING, INC., &c., *et al.*,

Appellants,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,

Respondents.

The appellants in the above entitled appeal appeared by Kavinoky and Cook, Esqs.; the respondents appeared by Hon. Robert Abrams, Attorney General of the State of New York.

The Court, after due deliberation, orders and adjudges that the order reversed, with costs, and case remitted to the Appellate Division, Third Department, for further

proceedings in accordance with the opinion herein. Certified question answered in the affirmative. Opinion by Judge Simons. Chief Judge Wachtler and Judges Kaye, Alexander, Titone, Hancock and Bellacosa concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Appellate Division, Third Department there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

DONALD M. SHERAW
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, May 7, 1987

Opinion.

COURT OF APPEALS,

STATE OF NEW YORK.

3 No. 109

HERZOG BROTHERS TRUCKING, INC., &c., *et al.*,

Appellants,

v.

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, *et al.*,

Respondents.

(109) Joseph E. Zdarsky, Buffalo, for appellant.

Robert Abrams, Attorney General (Lew A. Millenbach, O. Peter Sherwood, & Peter H. Schiff of counsel) for respondent.

SIMONS, J.:

In this action for a declaratory judgment concerning the power of the State Tax Commission to impose a tax on an out-of-state plaintiff's wholesale distribution of motor fuel to Seneca Indian retailers on the Allegany and Cattaraugus Reservations, plaintiffs appeal pursuant to permission granted by the Appellate Division on the certified

question: "Did this court err as a matter of law in reversing the order of Special Term and denying plaintiffs' motion for a preliminary injunction?" We hold that the Appellate Division's determination of the motion for a preliminary injunction was erroneous and, consequently, we reverse the order below and remit the matter to the Appellate Division for further proceedings.

I

The underlying facts are not in dispute. Plaintiffs, Herzog Brothers Trucking, Inc. and its corporate principals, allege in their complaint that Herzog is a Pennsylvania corporation engaged in wholesale and retail distribution and sales of motor fuels. In June 1984, Herzog began wholesale distribution of motor fuel to the Seneca Nation of Indians on its Allegany and Cattaraugus reservations in New York, selling the motor fuel to authorized Indian retail establishments on these reservations. Such sales constituted Herzog's only transactions in motor fuel in this state. Prior to June 1, 1985, sales tax on motor fuel was to be collected at the time the fuel was sold to the ultimate consumer, and a motor fuel tax was to be collected upon the first sale by the distributor (*see*, Tax Law, former arts. 12-A, 28). Believing themselves exempt from state regulation and taxation of motor fuel purchases, the Seneca Indian retailers refused to pay Herzog any state taxes on these transactions. Nevertheless, in October 1984, the State Tax Commission began assessing motor fuel taxes against the corporation.

On June 1, 1985, in order to prevent the continued circumvention of the sales tax on motor fuel, the Legislature amended article 28 of the Tax Law to impose the sales tax at the time that the motor fuel is imported or first sold (*see*, L 1985, ch 44, § 20, adding Tax Law § 1102). Thus, at the present time, articles 12-A and 28 of the Tax Law im-

pose motor fuel and sales taxes upon the importation and sale of motor fuel within the state (*see*, Tax Law §§ 284, 284-a, 284-c, 1101[b][4][ii], 1102, 1105). The taxes are assessed to, and collected from, the distributor and then included in its wholesale price (*see*, Tax Law § 282[1]). Following purchase from the distributor, the retailer includes the tax in its retail price and passes it on to the ultimate consumer. Where the ultimate consumer is an Indian, or otherwise exempt from taxation, the taxes are refunded, or a credit is given (*see*, Tax Law §§ 289-c, 1139).

Plaintiffs brought this declaratory judgment action in November 1985 seeking a declaration that the State of New York is without power to impose the motor fuel taxes and sales taxes on Herzog's sales to Indians on Indian reservations; that the Tax Law, both prior and subsequent to the 1985 amendment, does not expressly apply to its sales of motor fuel to Indians on Indian reservations and that, insofar as the Tax Law purports to impose these taxes on such sales, it is unconstitutional; that the State of New York is without power to regulate or interfere with sales of motor fuel by Herzog to Indians on Indian reservations and, to the extent state requirements concerning registration, recordkeeping, filing of returns and claiming of refunds apply to such sales, the requirements are unconstitutional. Thereafter, by motion for an order to show cause, plaintiffs moved for a preliminary injunction enjoining and restraining the State of New York from determining, collecting or attempting to collect any motor fuel taxes and sales taxes on the sales of motor fuel by Herzog to Indians on Indian reservations and from otherwise interfering or regulating such sales. Special Term granted plaintiffs' motion for a preliminary injunction, reasoning that "[t]he eventual success of plaintiffs on the merits of their application is manifest." On appeal, the Appellate Division reversed the order on the law and denied the mo-

tion for a preliminary injunction. The court found that plaintiffs failed to establish the requisite clear likelihood of success on the merits, because the challenged provisions of the Tax Law merely imposed a " 'minimal burden' of collecting the taxes from a non-Indian consumer on an Indian tribe or retailer as long as the legal incidence of the taxes falls on non-Indian purchasers." The Appellate Division, therefore, held that the imposition of motor fuel and sales taxes on Herzog's motor fuel transactions with the Seneca Nation was "fair, impartial and permissibly constitutional." Two justices dissented from the Appellate Division order of reversal on the ground that federal law pre-empts and prohibits the imposition of taxes by a state when the burden of such taxes are borne by reservation Indians, or when the tax is applied to the trade relationship between reservation Indians and their suppliers.

II

In general, the determination of an application for a provisional remedy is addressed to the discretion of the lower courts and—absent a question of power to exercise discretion, or abuse in the exercise of discretion, in determining the application—is beyond this court's review (*see, Brady v Ottaway Newspapers,* 68 NY2d 1031). When, however, the Appellate Division denies discretionary relief on an issue of law alone, and makes clear that no question of fact or discretion entered into its decision, that question of law is considered decisive of the correctness of the determination and this court has jurisdiction to review it on a properly certified question from the Appellate Division (*see,* Cohen and Karger, Powers of the New York Court of Appeals, § 88, p 377 [1952 ed.]; *Public Administrator of County of N.Y. v Royal Bank of Canada,* 19 NY2d 127, 129-130). The only issue before us on this appeal by certified question is whether, on the motion for

a preliminary injunction, plaintiffs failed to establish, as a matter of law, the requisite clear likelihood of success on the merits of their challenge to the Tax Commission's imposition of taxes on their motor fuel transactions with the Seneca Nation of Indians residing on the Allegany and Cattaraugus Reservations.

III

Plaintiffs contend that New York may not constitutionally tax their wholesale sales of motor fuel to Indian retailers on Indian reservations because the state is precluded from doing so "by the United States Constitution and the laws of the United States enacted pursuant thereto" (Tax Law § 284 [1] and 1102). They argue that the federal Indian trader statutes (25 USC §§ 261-264), enacted pursuant to Article 1, section 8, clause 3 of the United States Constitution,[1] vest the Commissioner of Indian Affairs with the sole power and authority to regulate trade with Indians. They contend that, by virtue of such legislation and supporting regulations, federal law has totally preempted the regulation of sales made to Indians on Indian reservations, including state taxation of Indian trade (citing *Central Machinery Co. v. Arizona State Tax Comm'n,* 448 US 160). Plaintiffs further maintain that, although Indian vendors in a chain of distribution might be required to collect a tax from a non-Indian retail customer, the Indian vendors cannot be required to pay a state tax to their suppliers in connection with their wholesale purchases (relying on *California State Bd. of Equalization v Chemehuevi Indian Tribe,* ____ US ____, 106 S Ct 289, *reh den* ____ US ____, 106 S Ct 839; *Washington v Confederated Tribes of Colville Indian*

[1]Article 1, section 8, clause 3 of the Constitution grants Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Reservation, 447 US 134, *reh den* 448 US 911; *Moe v Confederated Salish and Kootenai Tribes,* 425 US 463).

Defendants counter that the tax scheme here challenged neither imposes a tax upon plaintiffs or the Seneca Nation of Indians, nor places an impermissible burden upon a transaction between them. The Tax Law merely requires that Herzog and the Indian retailers keep adequate records of their sales, and imposes upon them a minimal burden of precollecting the taxes due from the non-Indian consumer. Where the ultimate sales are made to Indians, the state refunds that portion of the tax prepaid by the retailer and distributor. Defendants maintain that the motor fuel tax scheme is proper and constitutional, for federal law has not pre-empted the State of New York from exercising its authority to compel the assistance of distributors and retailers in *collecting* taxes owed by non-Indian consumers (relying on *Washington v Confederated Tribes of Colville Indian Reservation, supra*). Rather, the Supreme Court has upheld state tax schemes that require prepayment of state taxes by Indian vendors (citing *Moe v Confederated Salish and Kootenai Tribes, supra; Washington v Confederated Tribes of Colville Indian Reservation, supra*). Defendants contend that as long as the actual burden, as well as the legal incidence, of the motor fuel taxes falls on the non-Indian consumer—which it does here—the taxing scheme is constitutional.

The Supremacy Clause of the United States Constitution[2] invalidates state laws that "interfere with, or are con-

[2]The Supremacy Clause of the United States Constitution contained in Article 1, section VI, clause 2, provides:

> "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

trary to" federal law (*see, Hillsborough County, Fla. v Auto. Med. Labs.*, ____ US ____, 105 S Ct 2371, 2375 [*quoting Gibbons v Ogden*, 9 Wheat 1, 211]). The operation of the Supremacy Clause is not dependent on an express Congressional statement of pre-emption. Rather, "Congress' intent to pre-empt all state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation" (*id.* [citing *Rice v Santa Fe Elevator Corp*, 331 US 218, 230]; *see also*, Tribe, American Constitutional Law, § 6-25, p 384). Pre-emption of a whole field of regulation is likewise inferred where federal interest in that field "is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" (*Hillsborough County, Fla. v Auto. Med. Labs, supra*, p 2375 [*quoting Rice v Santa Fe Elevator Corp, supra*).

As a leading treatise on Indian law indicates: "Indian affairs occupy a unique place in Supremacy Clause law and theory" (Cohen, Handbook of Federal Indian Law, p 272 [1982 ed.]; *see generally, id.* at 270-279). This is apparent from the fact that the Supreme Court has relied almost exclusively on prior legislative and judicial precedent involving Indian matters, without relying on Supremacy Clause precedents in other fields, in determining the scope of the pre-emption doctrine in Indian cases (*id.* at 272-273). Inasmuch as the Constitution vests the federal government with exclusive authority over relations with Indian tribes, Congress has plenary and pre-emptive power in all matters concerning the Indians, subject to the Bill of Rights and other constitutional considerations (*see, Montana v Blackfeet Tribe of Indians*, 471 US ____, 105 S Ct 2399, 2402 [construing US Const, art 1, § 8, cl 3]); *and see*, Tribe, American Constitutional Law, § 16-14, p 1018, *supra*).

In general, Indian tribes and individuals are exempt from state taxation within their own territory. Congress may authorize the imposition of state taxes upon them if it so chooses, but it has never done so as a general matter and the Supreme Court has refused to uphold state taxation of Indians absent an "unmistakably clear" expression of Congressional intent to authorize the particular tax (*see, Montana v Blackfeet Tribe of Indians, supra,* pp 2402-2403; *see, generally,* Cohen, Handbook of Federal Indian Law, *supra,* pp 407-412; Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians,* 40 Law & Contemp Probs 166, 183 [1976]). States may validly impose a non-discriminatory tax on the non-Indian customers of Indian retailers doing business on reservations, however, even if the tax seriously disadvantages or eliminates the Indian retailer's business with non-Indians (*Washington v Confederated Tribes of Colville Indian Reservation,* 447 US 134, 151, *supra* [discussing the principles set forth in *Moe v Confederated Salish and Kootenai Tribes,* 425 US 463, *supra*]). If the incidence of the tax falls on non-Indians, the state's action in imposing the tax is permissible because it does not interfere with any supervening federal law and does not violate the proscription against direct taxation of Indians without clear Congressional consent (*see, Moe v Confederated Salish and Kootenai Tribes, supra,* p 483 [construing *Mescalero Apache Tribe v Jones,* 411 US 145, 148]). Thus, the Supreme Court has approved state taxation schemes requiring Indian retailers on reservations to collect the tax imposed on the non-Indian customer, reasoning that such a requirement "Is a minimal burden designed to avoid the likelihood that in its absence non-Indians purchasing from the tribal seller will avoid payment of a concededly lawful tax" (*Moe v Confederated Salish and Kootenai Tribes, supra,* p 483; *see also, California State Bd. of Equalization v Chemehuevi Indian Tribe,* 106 S Ct 289, *supra*). The

same rationale has been applied to state taxation schemes that require Indian retailers on reservations to keep detailed records of all exempt and non-exempt sales of taxable items (*see, Washington v Confederated Tribes of Colville Indian Reservation,* 447 US 134, 160, *supra*). Defendants contend that the present statutes are lawful because they do no more than what these Supreme Court decisions permit. The Appellate Division agreed with this reasoning but we are persuaded otherwise.

Concededly the tax assessed here must ultimately be paid by non-Indians, but that is not the end of the inquiry. When a state tax is imposed upon, or otherwise burdens, a transaction between a non-Indian customer and an Indian individual or tribe, and the legal incidence of the tax is determined to properly fall on the non-Indian party, the Supreme Court has nonetheless "examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence" to determine whether the method of collecting the state tax is constitutional (Cohen, Handbook of Federal Indian Law, *supra,* p 413 [quoting *White Mountain Apache Tribe v Bracker,* 448 US 136]). Where, as here, the taxation scheme imposes obligations on a wholesale trader to Indian retailers on Indian reservations, a different result follows than that urged by defendants, and adopted by the Appellate Division, because federal law pre-empts and invalidates the state action (*see generally, id.* at 413-414).

The Supreme Court has drawn a clear distinction between state taxation schemes which merely require Indian retailers to collect a valid tax on non-Indian purchasers and those that burden persons engaged in trade with Indians on reservations (*see, Washington v Confederated Tribes of Colville Indian Reservation,* 447 US 134, 155, *supra; Moe v Confederated Salish and Kootenai Tribes,*

425 US 463, 482-483, *supra*). A dispositive factor recognized by the court in drawing such a distinction is the clearly manifested intent of Congress in enacting the trader laws to foster tribal self-government and economic development by enactment of the trader statutes (*see, Washington v Confederated Tribes of Colville Indian Reservation, supra,* p 155 [construing 25 USC §§ 261 *et seq.*). No similar intent is implicated in sales by reservation Indians to non-Indians (*Id.* at 155-156). Thus, since there is no dispute that plaintiff Herzog is a "trader" within the meaning of the federal Indian trader laws,[3] we must consider the Indian trader statutes, and the cases construing them, to determine if federal law pre-empts the state tax at issue.[4]

Ever since Congress passed a statute in 1790 regulating the licensing of Indian traders, the federal government has "comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them" (*Central Machinery*

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[3]25 USC § 261 provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

The Supreme Court has construed the term "trader" to apply to any person introducing goods, or trading, in Indian country or on an Indian reservation (*see, Central Machinery Co. v. Arizona State Tax Com.*, 448 US 160, 164-165 [relying on 25 USC § 264]).

[4]A 1906 opinion by this court holds that, because of the unique history of the Seneca Nation of Indians in this state, New York has exclusive sovereignty and jurisdiction over these Indians, and the Indian trader statutes are not applicable to their affairs (*see, Jemison v Bell Telephone Co. of Buffalo,* 186 NY 493). Although *Jemison* has never been explicitly overruled, its holding has been implicitly rejected by subsequent decisions of this court and of the Supreme Court (*see, e.g., Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685; *People ex rel. Cusick v. Daly,* 212 NY 183, 196-197).

Co. v. Arizona State Tax Com., 448 US 160, 163, *supra* [discussing Act of July 22, 1790, ch 33, 1 Stat 137]). The present laws, known collectively as the Indian trader statutes, similarly "incorporate a congressional desire comprehensively to regulate businesses selling goods to reservation Indians for cash or exchange" (*Washington v Confederated Tribes of Colville Indian Reservation*, 447 US 134, 155, *supra*). In *Warren Trading Post Co. v Arizona Tax Com.*, which involved a retail trader's challenge to a state tax on gross proceeds or income from sales imposed on its trade with Indians on the Navaho Reservation, the Supreme Court emphasized that the federal government has exercised "a sweeping and dominant control over persons who wished to trade with Indians and Indian tribes" (*Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685, 687-688). In construing the federal Indian trader laws, and the implementing regulations, the court observed that "[t]hese apparently all-inclusive regulations and the statutes authorizing them would seem themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders" (*id* at 690 [footnote omitted]).

Later, in the *Central Machinery Co.* case involving an Arizona "transaction privilege" tax assessed against the seller of tractors to an enterprise of the Gila River Indian Tribe, the Supreme Court reaffirmed that the mere *existence* of the Indian trader laws pre-empted the field of transactions with reservation Indians, even where the seller was an unlicensed trader with no permanent place of business on the Indian reservation (*see, Central Machinery Co v Arizona State Tax Com.*, 448 US 160, 165, *supra*). The court noted that "[i]t may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until

Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as their language' . . . and interpret them in light of the intent of the Congress that enacted them' (*id.* at 166 [citations omitted]).

The Supreme Court cases construing the Indian trader statutes are dispositive. We determine that Congress has preempted the field of regulating trade with Indians on reservations and has left "no room" for the application of supplementary state tax laws, such as the one here at issue, that impose "additional burdens" on Indian traders (*see, Warren Trading Post Co. v. Arizona Tax Com.*, 380 US 685, 690, *supra*). Thus, no matter how minimal the burden imposed by the motor fuel taxation scheme on Herzog, as a trader to the Seneca Nation, such regulation is preempted by the federal trader laws and the Appellate Division erred, as a matter of law, in holding that plaintiffs had not established a "clear likelihood of success on the merits" on their application for a preliminary injunction.

Accordingly, the certified question should be answered in the affirmative, the order of the Appellate Division reversed and the matter remitted to that court for a consideration of undetermined questions (*see, Public Administrator of County of N.Y. v Royal Bank of Canada*, 19 NY2d 127, 129-130, *supra*).

* * * * * * * * * * * * * * * * * *

Order reversed, with costs and case remitted to the Appellate Division, Third Department, for further proceedings in accordance with the opinion herein. Certified question answered in the affirmative. Opinion by Judge Simons. Chief Judge Wachtler and Judges Kaye, Alexander, Titone, Hancock and Bellacosa concur.

Decided May 7, 1987

APPENDIX B—Opinion of the Appellate Division—Third Department.

SUPREME COURT

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

July 31, 1986 52150

HERZOG BROTHERS TRUCKING, INC., Also Known as Herzog Brothers, Inc., *et al.*,

Respondents,

v

STATE TAX COMMISSION OF THE STATE OF NEW YORK *et al.*,

Appellants.

CASEY, J.:

Appeal from an order of the Supreme Court at Special Term (Kahn, J.), entered March 3, 1986 in Albany County, which granted plaintiffs' motion for a preliminary injunction.

Plaintiff Herzog Brothers Trucking, Inc. (Herzog) is a Pennsylvania corporation engaged in the wholesale and retail distribution and sale of motor fuels. In June 1984, wholesale distribution of motor fuels was made to the

Seneca Nation of Indians on the Allegany and Cattaraugus Reservations, and sales were made to authorized retail establishments located on the reservations. These distributions and sales are the only ones made by Herzog in this State.

Prior to June 1, 1985, sales taxes were collected at the time motor fuels were sold to the ultimate consumer and the motor fuel tax was collected upon the first sale by the distributor (*see*, Tax Law former arts 12-A, 28). However, the Indian retailers claiming exemption from State taxation refused to pay the motor fuel tax (Tax Law art 12-A) or sales tax (Tax Law art 28). Because non-Indians were driving to the reservations and purchasing motor fuels and avoiding the payment of taxes, a statutory amendment was enacted on June 1, 1985 (L 1985, ch 44, § 20, adding Tax Law § 1102). In order to deter this tax evasion, the amendment imposed taxes at the time the fuel is imported or first sold (Tax Law § 1102 [a] [i], [ii]). As amended, the pertinent provisions of the Tax Law provide that an excise tax (Tax Law § 284 [1]) and a sales tax (Tax Law § 1102 [a]), except as prohibited by the US Constitution and the laws of the United States enacted pursuant thereto, are imposed on the importation of motor fuels by a distributor of such fuels. Both the motor fuel and sales taxes are then passed through to the retailer and are ultimately to be borne by the retail consumer (*see*, Tax Law § 289-c [1], [2]; § 1102 [d]; § 1132 [a]; § 1133 [a]). All such fuel imported or sold in this State is presumed to be subject to the motor fuel tax (Tax Law § 285-a). If the distributor fails to collect the tax, the purchaser of the fuel is required to remit the tax (Tax Law § 284 [3]; § 1102 [b]). Every person who imports or sells motor fuel is also required to register (Tax Law § 283 [1]; § 1134), keep detailed records of his sales (Tax Law §§ 287, 1136) and post bonds or deposit securities "to secure the payment of any sums due from such distributor" (Tax Law § 283 [3]). The bonding re-

quirement appears to apply only to the distributors of motor fuel, while the other requirements apply to both distributors and retailers of motor fuels. The Tax Law further provides for a refund or credit for any tax which is collected from or paid by a person or entity which is exempt from such taxation (*see*, Tax Law §§ 289-c, 1139). The assessment in this case against Herzog is for past sales covering the period from June 1, 1984 to May 31, 1985.

In October 1984, defendants began assessing motor fuel tax and sales tax against Herzog with regard to the past sales. These assessments approximated $480,000, exclusive of penalties and interest. Herzog filed petitions challenging this assessment, claiming exemption because all their sales were to Indians or Indian reservations. In November 1985, while administrative proceedings were still pending, the instant declaratory judgment action was commenced by Herzog and its shareholders seeking a declaration of unconstitutionality of the taxes and the procedures employed to collect them. Subsequently, plaintiffs moved for a preliminary injunction to restrain defendants from taking any action in regard to imposing or collecting the taxes. Special Term granted the preliminary injunction and fixed an undertaking of $250. This appeal by defendants followed.

To obtain a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury if the relief is not granted, and (3) a balancing of the equities in his favor (*Clark v. Cuomo*, 103 AD2d 244, 245). When the injunction is sought to restrain the enforcement of a tax, it should be granted only in the most unusual cases (*Grant Co. v Srogi*, 52 NY2d 496, 517). In their application, plaintiffs have not demonstrated their clear entitlement to the relief that they seek.

Facially, the pertinent statutory provisions do not appear unconstitutional. Although Federal law prohibits the imposition of State taxes on Indians who are members of a

reservation (*Central Mach. Co. v. Arizona State Tax Commn.*, 448 US 160), a State may impose non-discriminatory taxes on non-Indian customers of Indian retailers who do business on the reservations (*Moe v. Confederated Salish and Kootenai Tribes*, 425 US 463; *see, California State Bd. of Equalization v. Chemehuevi Indian Tribe*, ____ US ____, 106 S Ct 289) and may further impose the "minimal burden" of collecting the taxes from a non-Indian consumer on an Indian tribe or retailer as long as the legal incidence of the taxes falls on non-Indian purchasers (*Moe v. Confederated Salish and Kootenai Tribes, supra*, p 483). This is precisely what the above statutory provisions require and allow. By their wording, the statutes appear to apply with an even hand in a fair, impartial and permissibly constitutional manner sufficient to meet the attack made by plaintiffs herein.

The critical question, of course, and the one which divides this court, is whether the burden of total prepayment intitially imposed on Herzog as the distributor, which is subject ultimately to a refund or credit if the sales have been made to exempt entities or persons, imposes a burden on plaintiffs that exceeds the permissible "minimal burden of collection" standard. In our opinion, plaintiffs' application for a preliminary injunction does not demonstrate any such excess. Plaintiffs have, therefore, failed to establish the clear likelihood of success on the merits required for a showing of their entitlement to a preliminary injunction. Accordingly, their application for such injunction should be denied and the order of Special Term reversed.

Order reversed, on the law, without costs, and motion denied.

Mahoney, P.J. Casey and Levine, JJ., concur; Kane and Mikoll, JJ., dissent and vote to affirm in a memorandum by Mikoll, J.

MIKOLL, J. (dissenting):

We respectfully dissent.

The issue to be decided on this appeal is whether Special Term properly granted plaintiffs' motion for a preliminary injunction. "In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury to him if the relief is not granted, and (3) a balancing of the equities in his favor" (*Clark v Cuomo*, 103 AD2d 244, 245). Appellate review is "limited to determining whether Special Term erred in finding that plaintiff had satisfactorily met his burden as to all three of the criteria delineated above which would entitle him to a preliminary injunction" (*id.*, at 245-246). While issuance of a preliminary injunction to restrain the enforcement of a tax is permissible, it should only be exercised in the most unusual circumstances (*Grant Co. v Srogi*, 52 NY2d 496, 517).

In the case at bar, there should be an affirmance. Special Term did not abuse its discretion in finding that plaintiffs demonstrated the likelihood of their success on the merits, irreparable injury if relief were not granted and the equities balanced in their favor. The required unusual circumstances exist in this case (*see, Grant Co. v Srogi, supra*).

Plaintiff Herzog Brothers Trucking, Inc. (Herzog) began making distributions of motor fuels to members of the Seneca Nation of Indians on the Allegany and Cattaraugus Reservations in June 1984. The sales were made to retail establishments located on the reservations which were authorized to purchase motor fuels on behalf of the Seneca Nation of Indians. Herzog's only sales in this State were to these Indians. The Indian retailers claimed that they were exempt from State taxation and refused to pay any motor fuel tax (Tax Law art 12-A) or sales tax (Tax

Law art 28). Thus, neither tax was collected as to any of the sales.

Defendants contend that they can constitutionally subject plaintiffs and the Indian retailers to the burden of acting as their "agents" to assist in collecting the taxes in dispute and can require them to comply with the Tax Law's administrative provisions. We disagree.

Federal law preempts, and thus prohibits, the imposition of taxes by a state when the burden of such taxes is borne by Indians who are members of the reservation involved (*see, Central Mach. Co. v Arizona State Tax Commn.*, 448 US 160; *Warren Trading Post v Arizona State Tax Commn.*, 380 US 685, 691-692). However, a state may impose nondiscriminatory taxes on non-Indian customers of Indian retailers who conduct their business on the reservation (*see, Moe v Confederated Salish and Kootenai Tribes*, 425 US 463; *see also, California State Bd. of Equalization v Chemhuevi Indian Tribe*, ___ US ___, 106 S Ct 289; *Washington v Confederated Tribes of Colveille Indian Reservation*, 447 US 134). As long as the legal incidence of the taxes falls only on the non-Indian purchaser, a state may even impose on an Indian tribe or Indian retailer the *minimal burden* of collecting the taxes from the non-Indian consumer (*Moe v Confederated Salish and Kootenai Tribes, supra*, pp 482-483; *see, California State Bd. of Equalization v Chemehuevi Indian Tribe, supra*). In the case at bar, however, the burden imposed on the Indians appears to be more than the minimal burden approved by the Supreme Court in the above-referenced cases. The Indian retailers are required to prepay the entire amount of these taxes even though the majority of their sales are presumably tax free. In effect, an Indian retailer is required to prepay a tax on a transaction in which no tax is imposed. Since no tax is or would ever be due on the sale of motor fuel to Indians, the Indian retailer is being deprived of his money for a period of time

until he can prove it should be returned to him under this scheme. It clearly appears, therefore, that the cases relied on by defendants to justify this taxing scheme are distinguishable and inapplicable to the situation in this case. The tax on sales to Indians is preempted and thus prohibited. The taxing scheme therefore effectively requires plaintiffs to prepay a prohibited tax. This requirement on plaintiffs is also destructive of the trade relationship between Indians and their suppliers and is thus an unauthorized interference in Indian trading, an area preempted by Federal law (*see, Central Mach. Co. v Arizona State Tax Commn., supra*).

Furthermore, Special Term's finding that plaintiffs established that they would suffer irreparable injury absent injunctive relief was proper. Plaintiffs assert that the Indian accounts constituted approximately 50% of their business and about $7,000 in sales per week. They assert that without such revenue, equipment purchased and financed to service those accounts would be lost. That loss to plaintiffs appears to be commercially life threatening, thus warranting the grant of a preliminary injunction (*see, Stanley-Fizer Assoc. v Sport-Billy Prods. Rolf Dehyle*, 608 F Supp 1033, 1035). It is also possible that further criminal sanctions may be imposed on plaintiffs after November 1, 1985. Accordingly, Special Term did not abuse its discretion when it found irreparable injury to plaintiffs.

Nor did Special Term abuse its discretion when it concluded that the equities balanced in plaintiffs' favor. Plaintiffs did not create the problems sought to be remedied by the new taxing scheme. It appears that plaintiffs relied in good faith on the Indian retailers' assurances that they were not required to pay these taxes. Moreover, the sums involved are substantial to plaintiffs but are insubstantial to defendants.

Additionally, we reject defendants' contention that plaintiffs should have exhausted their administrative remedies before pursuing this declaratory judgment action. "[W]hen the taxing authority's jurisdiction is challenged as unconstitutional or as inapplicable" (*Horner v State of New York*, 107 AD2d 64, 65), or when the constitutionality of a statute is challenged (*see*, *Allstate Ins. Co. v Tax Commn. of State of N.Y.*, 115 AD2d 831, 834; *Reader's Digest Assn. v Friedlander*, 100 AD2d 871, 872, *lv denied* 64 NY2d 601), there is no need to exhaust administrative remedies. Special Term's order should be affirmed.

APPENDIX C—Opinion of the Supreme Court, Albany County.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF ALBANY.

HERZOG BROTHERS TRUCKING, INC., a/k/a Herzog Brothers, Inc., GREGORY HERZOG, GARY HERZOG, STEPHEN HERZOG and DAVID HERZOG,

Plaintiffs,

against

THE STATE TAX COMMISSION OF THE STATE OF NEW YORK, RODERICK G. W. CHU, as Commissioner of Taxation and Fianance of the State of New York, and THE DEPARTMENT OF TAXATION AND FINANCE OF THE STATE OF NEW YORK,

Defendants.

Supreme Court, Albany County Special Term

December 6, 1985—Calendar No. 38

Justice Lawrence E. Kahn, Presiding

Appearances:

Kavinoky & Cook, Esqs., Attorneys for plaintiffs, 120 Delaware Avenue, Buffalo, New York 14202, (716) 856-9234.

Rowley, Forrest and O'Donnell, Attorneys for plaintiffs (of Counsel), 90 State Street, Albany, New York 12207, 434-6187.

Hon. Robert Abrams, Attorney General, Attorney for defendants, Lawrence L. Doolittle, Esq. (of Counsel), The Capital, Albany, New York 12224, 474-2121 474-2234.

KAHN, J.:

As an adjunct to plaintiffs' action for declaratory and injunctive relief, the court has before it a motion for a preliminary injunction restraining defendants from determining or collecting any motor fuel taxes and sales taxes alleged to be owed by plaintiffs, pursuant to Articles 12-A and 28 of the Tax Law, with respect to motor fuel sold by Herzog Brothers Trucking, Inc., a/k/a Herzog Brothers, Inc., to Seneca Indians on Seneca Indian Reservations. Plaintiffs seek to preliminarily enjoin defendants from invoking any civil or criminal proceedings, or other provisions of the Tax Law with respect to the aforesaid sales. The underlying facts and statutes are well-known to the litigants and shall not be repeated at length herein.

The sole issue before this court is plaintiffs' application for preliminary injunctive relief. It is well-settled that such requests are "granted sparingly and only when the moving party has clearly established: (1) the likelihood of his ultimate success on the merits, (2) an urgent necessity to prevent immediate and irreparable injury, and (3) a balancing of the equities in favor of the granting of such relief . . . And when his request for such relief challenges the constitutionality of presumptively valid and carefully con-

sidered legislation, or administrative regulations of a legislative nature, he assumes the heavier burden of establishing unconstitutionality, and his right to injunctive relief, beyond a reasonable doubt . . . ." (*Galaxy Rental Serv. v State of New York,* 108 Misc 2d 237, 239-240).

The motion shall be granted. The eventual success of plaintiffs on the merits of their application is manifest (*Central Machinery Co. v Arizona Tax Commission,* 448 U.S. 160). While defendants may constitutionally require the Seneca Indian vendors to assist them in collection of taxes imposed upon non-Indian purchasers (*Washington v Confederated Tribes of Colville,* 447 U.S. 134), it may not require prepayment of the motor fuel and sales taxes by such vendors for all wholesale purchases from plaintiffs. "[T]he first taxable event is the use, consumption or possession by the non-Indian purchaser." (*supra,* p 142).

Upon the submissions before the court, plaintiffs have established irreparable injury absent preliminary relief. They have incurred substantial debt through the purchase and lease of equipment to service their Indian accounts in this state. Further, they continue to be exposed to the threat of both criminal and civil enforcement of the challenged statute. "Under the circumstances, plaintiff has sufficiently established a likelihood of ultimate success on the merits, and should not be required to suffer further economic damage during the pendency of an action in which it appears that it will be ultimately successful as a matter of law." (*Social Spirits, Inc. v. Town of Colonie,* 70 AD2d 1036, 1038).

Upon the question of the balancing of the equities of the litigants, it is clear that the recent amendments to the Tax Law are intended to halt the alleged illegal activity by certain Indian vendors who sell gasoline to non-Indians at prices substantially below gas stations off the reservation. Plaintiffs have neither created this problem nor have any control over retail sales after the gasoline has been purchased by the Indian vendors.

Finally, the court notes that this is not litigation where plaintiffs need to exhaust available administrative remedies (*Allstate Ins. Co. v NYS Tax Comm.*, AD2d , December 5, 1985, Appellate Division, Third Department). The doctrine of exhaustion of administrative remedies is not applicable where the constitutionality of the statute is challenged or is claimed to be inapplicable by its own terms (*Slater v Gallman,* 38 NY2d 1).

The motion of plaintiffs for a preliminary injunction shall be granted. The injunction shall issue upon the condition that plaintiffs file an undertaking in the sum of $250 (*Horner v State of New York,* 125 Misc 2d 1, 8; affd 107 AD2d 64). All papers to attorneys for plaintiffs, who shall submit an order in conformance herewith, with a copy of this decision annexed.

Dated: February 25, 1986
Albany, New York

APPENDIX D—Opinion of the Appellate Division—Third Department Following Remittance.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

July 16, 1987 52150

HERZOG BROTHERS TRUCKING, INC., Also Known as Herzog Brothers, Inc., *et al.*,

Respondents,

v

STATE TAX COMMISSION OF THE STATE OF NEW YORK *et al.*,

Appellants.

MIKOLL, J.:

Appeal from an order of the Supreme Court at Special Term (Kahn, J.), entered March 3, 1986 in Albany County, which granted plaintiffs' motion for a preliminary injunction.

When this matter was previously before us, we reversed Special Term's grant of plaintiffs' motion for a preliminary injunction (122 AD2d 518). The matter was appealed on a certified question to the Court of Appeals. Upon finding that Congress had preempted the field of

regulating trade with Indians on reservations and had left " 'no room' for the application of supplementary state tax laws, such as the one here at issue", the Court of Appeals reversed our order and remitted the case to this court for consideration of undetermined questions (69 NY2d 536, 546).

We now affirm Special Term's grant of a preliminary injunction. The Court of Appeals' decision makes it clear that plaintiffs will succeed on the merits. Plaintiffs have also adequately substantiated that they will suffer irreparable injury absent injunctive relief and that the equities otherwise balance in their favor.

Order affirmed, with costs.

Mahoney, P.J., Kane, Casey, Mikoll and Levine, JJ., Concur.

APPENDIX E—Statutory Provisions Involved.

25 USC

"§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

"§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

"§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

"§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior."

New York Tax Law

"§ 282. Definitions

As used in this article, 1. "Distributor" means any person, firm, association or corporation, who or which imports or causes to be imported into the state, for use, distribution, storage or sale within the state, any motor fuel; and also any person, firm, association or corporation who or which produces, refines, manufactures or compounds motor fuel within the state. Motor fuel brought into the state in the ordinary fuel tank connecting with the

engine of a motor vehicle, aeroplane, motor boat or other conveyance propelled by the use of motor fuel, and to be used only in the operation thereof, shall not be deemed imported within the meaning of this article, if not removed from such tank except as used in the propulsion of such engine."

"§ 283. Registration of distributors

1. The department of taxation and finance, upon the application of a person, shall register such person as a distributor under this article except as provided in subdivisions two and five of this section. The application shall be in a form and contain such data as the department of taxation and finance shall prescribe. No person, unless so registered, shall import or cause any motor fuel to be imported into the state, for use, distribution, storage or sale within the state or shall produce, refine, manufacture or compound motor fuel within the state. No distributor, unless so registered, shall make any sale, transfer, use or other disposition of motor fuel within the state, except a sale, transfer, use or other disposition, if any, as to which the state cannot impose such condition by reason of the United States constitution and of laws of the United States enacted pursuant thereto.

* * *

"3. The tax commission shall require a distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in this state or other security accept-

able to the tax commission, in such amount as the tax commission may fix, in an amount determined in accordance with rules and regulations prescribed by it, to secure the payment of any sums due from such distributor (i) pursuant to this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel. The tax commission shall require that such a bond or other security be filed before a distributor is registered, and the amount thereof may be increased at any time when in its judgment the same is necessary as a protection to the revenues under this article and articles twenty-eight and twenty-nine of this chapter. If securities are deposited as security under this subdivision, such securities shall be kept in the joint custody of the comptroller and the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from such distributor (i) pursuant to this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel, but no such sale shall be had until after such distributor shall have had opportunity to litigate the validity of any tax if it elects so to do. Upon any such sale the surplus, if any, above the sums due (i) under this article and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel shall be returned to such distributor. The department, when authorized by the distributor, shall furnish information regarding the distributor's registration and any other information which the distributor authorizes it to disclose.

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"7. Whenever evidence is furnished by the tax commission to any justice of the supreme court in court or at chambers, showing that any person not registered as a distributor as requried by this section has imported motor fuel into this state or caused motor fuel to be imported into this state or has produced, refined, manufactured or compounded motor fuel within this state, such justice shall make a summary order prohibiting such person and his agents from selling such motor fuel or any motor fuel illegally and also prohibiting all other persons from selling or releasing any motor fuel illegally imported or sold by such person until such person shall have registered, reported the importation or sale of such motor fuel illegally imported or sold and paid the tax thereon or until the tax commission consents to such sale."

"§ 284. Tax imposed

1. There is hereby levied and imposed an excise tax of four cents per gallon upon motor fuel (a) imported into or caused to be imported into the state by a distributor for use, distribution, storage or sale in the state or upon motor fuel which is produced, refined, manufactured or compounded by a distributor in the state (which acts shall hereinafter in this subdivision be encompassed by the phrase "imported or manufactured") or (b) if the tax has not been imposed prior to its sale in this state, which is sold by a distributor (which act, in conjunction with the acts described in paragraph (a) of this subdivision, shall hereinafter in this article be encompassed by the phrase "imported, manufactured or sold"), except when imported, manufactured or sold under circumstances which preclude

the collection of such tax by reason of the United States constitution and of laws of the United States enacted pursuant thereto or when imported or manufactured by an organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision for its own use or consumption and except kero-jet fuel when imported or manufactured by an airline for use in its airplanes. Provided, further, no motor fuel shall be included in the measure of the tax unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution. All tax for the period for which a return is required to be filed shall be due on the date limited for the filing of the return for such period, regardless of whether a return is filed by such distributor as required by this article or whether the return which is filed correctly shows the amount of tax due."

"§ 284-a. Additional motor fuel tax

In addition to the tax imposed by section two hundred eighty-four of this chapter, a like tax shall be imposed at the rate of three cents per gallon upon motor fuel imported, manufactured or sold within this state by a distributor. All the provisions of this article shall apply with respect to the additional tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-four."

"§ 284—c. Supplemental motor fuel tax

In addition to the taxes imposed by sections two hundred eighty-four and two hundred eighty-four-a of this chapter, a like tax shall be imposed at the rate of one cent per gallon upon motor fuel imported, manufactured or sold within this state by a distributor. Except for paragraph (b) of subdivision three of section two hundred eighty-nine-c, all the provisions of this article shall apply with respect to the supplemental tax imposed by this section to the same extent as if it were imposed by said section two hundred eighty-four. On and after the first day of October, nineteen hundred seventy-two, twenty-five per centum of the monies received by the department of taxation and finance pursuant to the provisions of this section shall be deposited to the credit of the emergency highway reconditioning and preservation fund established pursuant to the provisions of section eighty-nine of the state finance law. Beginning on April first, nineteen hundred eighty-three, twenty-five per centum of the monies received by the department of taxation and finance pursuant to the provisions of this section shall be deposited to the credit of the emergency highway construction and reconstruction fund established pursuant to the provisions of section eighty-nine-a of the state finance law."

"§ 285-a. Presumption of taxability

1. No person shall purchase motor fuel in this state, excluding a purchase at retail, unless the taxes imposed by this article have been assumed by a distributor registered under this article in accordance with a certification under subdivision three of

this section or paid by such distributor, and, in each of such instances, are passed through to such purchaser. In addition to any other civil and criminal penalties which may apply, any person who purchases motor fuel without having received a certification from the seller in accordance with subdivision three of this section shall be jointly and severally liable to pay the taxes imposed by this article with respect to such motor fuel.

"2. For the purpose of the proper administration of this article and to prevent evasion of the tax on motor fuel imposed by and pursuant to this article, it shall be presumed that all motor fuel imported, manufactured or sold, received or possessed in the state is intended for use, distribution, storage or sale in the state and subject to the taxes imposed by this article until the contrary is established. It shall be further presumed that all motor fuel so imported, manufactured or sold, received or possessed in the state by any person, other than motor fuel delivered into the ordinary fuel tank connected with the engine of a means of conveyance in order to propel it, or in small drums or similar containers, which such person cannot otherwise account for, is subject to the taxes imposed by this article and such person is responsible for payment of such taxes. Provided, however, a distributor of motor fuel who imports, manufactures or sells and stores in the state or who purchases and stores motor fuel in the state on which he has paid the taxes imposed by this article shall be allowed an adjustment in arriving at the gallons subject to the taxes imposed by such section on account of the gallons the distributor establishes were lost due to shrinkage, evaporation and handling; provided,

however, such allowance shall not exceed two percent of the fuel stored. Provided, further, that in arriving at the gallons of motor fuel subject to the taxes imposed by this article, there shall be allowed an adjustment on account of gallons lost or destroyed due to an accident, such as fire, and at the time of such loss or destruction where being held or transported for sale other than at retail. The burden of proving that any motor fuel is not so subject shall be upon the person so responsible for such payment with respect to such fuel.

"3. (a) Upon each sale of motor fuel, other than a sale at retail, the seller must give to the purchaser and the purchaser shall receive at the time of delivery of such motor fuel, a certification containing such information as the tax commission shall require which shall include a statement to the effect: (i) if such seller is a distributor registered under this article, that he assumed the payment of or paid the taxes imposed by this article and, in each case, is passing through such taxes; or (ii) that such seller is passing through such taxes which were so previously assumed or paid by an identified distributor registered under this article, and passed through to him.

"(b) If the certification required by this subdivision has been furnished to the purchaser at delivery and accepted in good faith, the burden of proving that the taxes imposed by this article were assumed or paid by a distributor registered as such under this article and passed through shall be solely on the seller.

"(c) Where the certification required under this paragraph is not furnished by the seller at delivery of motor fuel, it shall be presumed that the taxes imposed by this article have not been assumed or paid by a distributor registered as such under this article and that the purchaser in such case is jointly and severally liable for such taxes.

"(d) If, due to the circumstances of delivery, it is not possible to issue a certification required under this subdivision at the time of delivery of motor fuel, the tax commission may authorize the delivery of the certification required under this paragraph at a time after the delivery of the motor fuel which is the subject of the sale under the limited circumstances it shall prescribe and upon such terms and conditions it shall deem necessary to ensure collection of the taxes imposed by this article and the tax imposed by section eleven hundred two of this chapter."

"§ 286. Records to be kept by distributors and others

1. Every person who imports or causes to be imported into this state, or who produces, refines, manufactures or compounds within this state, or who purchases or sells in this state motor fuel or diesel motor fuel or ingredients which may be manufactured or compounded into motor fuel or diesel motor fuel, shall keep a complete and accurate record of all purchases and sales or other dispositions thereof and a complete and accurate record of the number of gallons of motor fuel or diesel motor fuel or such ingredients so imported, produced, refined, manufactured or compounded.

Every person who stores motor fuel or diesel motor fuel for compensation shall keep a complete and accurate record of the identity of the person for whom such fuel is stored, the quantity and type of fuel so stored, the identity of the person to whom such fuel is released from storage and the quantity and type of fuel so released. Such records shall be in such form and contain such other information as the tax commission shall prescribe. Said commission, by rule or regulation, also may require the delivery of statements to purchasers with consignments of motor fuel or diesel motor fuel or such ingredients, and prescribe the matters to be contained therein. Such records and statements, unless required by the tax commission to be preserved for a longer period, shall be preserved for a period of two years and shall be offered for inspection at any time upon oral or written demand by the commissioner of taxation and finance or his duly authorized agents. The tax commission is hereby further authorized to examine the equipment of any such person pertaining to the storage, sale or delivery of such fuels, as well as the stock of such fuels in the possession or control of such person. To verify the amount of tax due under this article, each such person is hereby directed and required to give to the tax commission or its duly authorized representatives, the means, facilities and opportunity for such examinations as are herein provided for and required. Nothing in this section contained shall be construed to require the keeping of a record of purchases or sales of motor fuel or diesel motor fuel or such ingredients at retail in small quantities or of motor fuel or diesel motor fuel imported into this state in the tank of a motor vehicle which supplies the fuel for its operation."

"§ 287. Payment of tax; returns

1. Every distributor shall, on or before the twentieth day of each month, file with the department of taxation and finance a return, on forms to be prescribed by the tax commission and furnished by such department, stating the number of gallons of motor fuel imported, manufactured or sold by such distributor in the state during the preceding calendar month, except that the tax commission may, if it deems it necessary in order to insure the payment of the taxes imposed by this article, require returns to be made at such times and covering such periods as it may deem necessary, and, by regulation, may permit the filing of returns by distributors of Diesel motor fuel on a quarterly, semiannual or annual basis, or may waive the filing of returns by a distributor of Diesel motor fuel for such time and upon such terms as it may deem proper if satisfied that no tax imposed by this article with respect to Diesel motor fuel is or will be payable by him during the time for which returns are waived. Such returns shall contain such further information as the tax commission shall require. The fact that a distributor's name is signed to a filed return shall be prima facie evidence for all purposes that the return was actually signed by such distributor. Each such distributor shall pay to the department with the filing of such return, the taxes imposed by this article on each gallon of motor fuel imported, manufactured or sold by such distributor in the state, and so reported, during the period covered by such return, except that, where a distributor has purchased motor fuel upon which the taxes imposed by this article have been paid or paid over and in each instance the tax is included in

the price, a credit shall be allowed for the amount of such taxes upon the subsequent sale of such fuel to the extent that such taxes are so paid and included in the price.

"2. A distributor entitled to a refund under the provisions of section two hundred eighty-nine-c of this chapter, in lieu of such refund, may take credit therefor on a return filed pursuant to this section, unless the tax commission shall withdraw such privilege."

"§ 289-c. Refunds

"1. The tax imposed by this article though payable by the distributor, shall be borne by the purchaser and when paid by the distributor shall be deemed to have been so paid for the account of the purchaser. No person shall sell, advertise, or offer for sale motor fuel, separate from the tax herein imposed; and the price paid by the purchaser for motor fuel on which the tax has been paid, if such price be not less than the amount of the tax thereon, shall be presumed for the purposes of this section to have included the tax.

"1-a. (a) Any person selling motor fuel to an organization described in paragraph one or two of subdivison (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision for its own use or consumption or selling kero-jet fuel to an airline for use in its airplanes may exclude the amount of the tax or taxes imposed by this article from the selling price thereof.

"(b) Any person making a sale of motor fuel under the circumstances described in paragraph (a) of this subdivision whereby the tax or taxes imposed by this article have not been passed through to the purchaser, shall be allowed a refund or credit of the tax or taxes imposed by this article in the amount of such tax or taxes paid by such person on the motor fuel being sold or included in the price paid by such person for such fuel. Claims for refunds or credits shall be presented, and refunds or credits shall be made, only as authorized by the tax commission under such rules and regulations as it may prescribe.

"2. However, the intention of this article is to place the ultimate burden resulting from such tax, so far as possible, on persons who use the public highways of the state for operating motor vehicles thereon, or who use the waterways of the state including any other waterways bordering on the state for operating pleasure or recreational motor boats thereon, and the following refunds are provided to that end, subject to the provisions of subdivision five of this section.

"3. (a) Except as otherwise provided in paragraph (b) of this section, any person who shall buy any motor fuel or diesel motor fuel, on which the tax imposed by this article shall have been paid, and shall consume the same in any manner except in the operation of a motor vehicle upon or over the highways of this state, or in the operation of a pleasure or recreational motor boat upon or over the waterways of the state including waterways bordering on the state, shall be reimbursed the amount of such tax in the manner and subject to the condi-

tions herein provided except that there shall be no reimbursement of tax paid on motor fuel or diesel motor fuel taken out of this state in a fuel tank connected with the engine of a motor vehicle and consumed outside of this state.

"(b) Any omnibus carrier which shall buy any motor fuel on which the aggregate tax imposed by section two hundred eighty-four and section two hundred eighty-four-a of this chapter, or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a and section two hundred eighty-two-b of this chapter, shall have been paid, shall be reimbursed, in the case of such motor fuel, the amount paid pursuant to such sections two hundred eighty-four and two hundred eighty-four-a in excess of four cents per gallon, and in the case of diesel motor fuel, the account paid pursuant to such sections two hundred eighty-two-a and two hundred eighty-two-b in excess of six cents per gallon, provided such motor fuel or diesel motor fuel has been consumed by such carrier in the operation of an omnibus in this state. Any taxicab licensee, as defined by subdivision ten of section two hundred eighty-two of this chapter, who or which shall buy any motor fuel on which the aggregate tax imposed by section two hundred eighty-four and section two hundred eighty-four-a of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a and section two hundred eighty-two-b of this chapter, shall have been paid, shall be reimbursed, in the case of such motor fuel, the amount paid pursuant to such sections two hundred eighty-four and two hundred eighty-four-a in excess of four cents per gallon, and in the case of diesel motor

fuel, the amount paid pursuant to such sections two hundred eighty-two-a and two hundred eighty-two-b in excess of six cents per gallon, provided such motor fuel or diesel fuel has been consumed by such licensee in the operation of a taxicab in this state.

"(c) All claims for reimbursement shall be in such form and contain such information, and be presented within such time as the state tax commission, by rules and regulations, shall prescribe. Every such claim shall include a certificate by or on behalf of the party presenting the same to the effect that it is just, true and correct, that no part thereof has been paid, except as stated therein, and that the balance therein stated is actually due and owing. The claimant shall satisfy the department of taxation and finance that he has borne the tax and that the motor fuel has been consumed by him in a manner other than the operation of a motor vehicle upon or over the highways of this state, the operation of a pleasure or recreational motorboat upon or over the waterways of the state including waterways bordering on the state or, in the case of an omnibus carrier, taxicab licensee, nonpublic school operator or volunteer ambulance service, that he has borne the tax and that the amount claimed is the amount of such tax reimbursable under paragraph (b), (d), (e) or (f) of subdivision three of this section. The department may require such further information or proof as it shall deem necessary for the administration of such claim. Claims for reimbursement approved by the department of taxation and finance shall be paid from revenues collected under this article and deposited to the credit of the comptroller as hereinafter provided; but no such claims shall be paid unless the department of taxa-

tion and finance is satisfied that the amount of the tax for which the reimbursement is claimed has actually been collected by the state. The amount of any erroneous or excessive payment to a claimant for reimbursement may be determined by the department of taxation and finance and may be recovered from such claimant in the same manner as a tax imposed by this article, provided, however, that any such determination shall be made within two years after the date of such erroneous or excessive payment.

"(d) Any omnibus carrier which shall buy motor fuel on which the aggregate tax imposed by section two hundred eighty-four, section two hundred eighty-four-a and section two hundred eighty-four-c of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a, section two hundred eighty-two-b and section two hundred eighty-two-c of this chapter shall have been paid, shall be reimbursed the amount paid provided such motor fuel or diesel motor fuel has been consumed by such carrier in the operation of an omnibus in local transit service in this state pursuant to a certificate of convenience and necessity issued by the commissioner of transportation of this state or by the interstate commerce commission of the United States or pursuant to a contract franchise or consent between such carrier and a city having a population of more than one million inhabitants, or any agency of such city.

"(e) Any nonpublic school operator which shall buy motor fuel on which the aggregate tax imposed by section two hundred eighty-four, section two hundred eighty-four-a and section two hundred

eighty-four-c of this chapter or any diesel motor fuel on which the aggregate tax imposed by section two hundred eighty-two-a, section two hundred eighty-two-b and section two hundred eighty-two-c of this chapter shall have been paid, shall be reimbursed the amount paid provided such motor fuel or diesel motor fuel has been consumed by such nonpublic school operator exclusively in educational related activities.

"(f) Any voluntary ambulance service, as defined in section thirty hundred one of the public health law, which shall buy motor fuel on which the tax or taxes imposed by this article shall have been paid shall be reimbursed the amount of such tax in the manner and subject to the conditions herein set forth, provided such motor fuel has been consumed by such volunteer ambulance service vehicle in the course of operating within the state.

"(g) An organization described in paragraph one or two of subdivision (a) of section eleven hundred sixteen of this chapter or a hospital included in the organizations described in paragraph four of such subdivision, or a fire company or fire department, as defined in section three of the volunteer firefighters' benefit law, or a volunteer rescue squad supported in whole or in part by tax money where any such entity is the purchaser, user or consumer of motor fuel or diesel motor fuel in a vehicle owned and operated by it and used exclusively for its purposes, or an airline where it has purchased kero-jet fuel for use in its airplanes shall be reimbursed the amount of the taxes on motor fuel and diesel motor fuel imposed by or pursuant to the authority of this article included in the price paid for such motor fuel or diesel motor fuel.

"4. "Highway," within the meaning of this section, means a highway, street, avenue, road, alley, boulevard, parkway, or other similar thoroughfare.

"5. If the provisions of this section providing for reimbursement of the amount of the tax paid be held unconstitutional by a court of competent jurisdiction, the other constitutional provisions of this article nevertheless shall stand, it being the express intention of the legislature that even though such provision for reimbursement be held unconstitutional the tax provided for by this article shall be imposed, collected and distributed as provided in this article, regardless in that event of the manner in which the motor fuel is consumed.

"6. Moneys paid in error under this article may be refunded. Where motor fuel, upon which the tax imposed by this article has been paid, is sold, under such circumstances that, if the tax had not been paid, the sale would not have been taxable under this article, the tax may be refunded. Refunds shall be made only as authorized by the tax commission under such rules and regulations as it may prescribe provided an application therefor is filed with the tax commission within two years from the time the erroneous payment was made, or tax paid motor fuel was so sold. Refunds authorized by the tax commission shall be paid from revenues collected under this article and deposited to the credit of the comptroller as hereinafter provided.

"7. If an agreement under the provisions of section two hundred eighty-eight (extending the period for determination of tax imposed by this article) is

made within the two-year period for the filing of an application for refund under subdivision six of this section or, in the case of a claim for reimbursement under subdivision three of this section, if such agreement is made within two years from the date of purchase of the motor fuel, the period for filing an application for refund or a claim for reimbursement shall not expire prior to six months after the expiration of the period within which determination may be made pursuant to the agreement or any extension thereof.

"8. With respect to motor fuel imported, manufactured or sold or purchased in this state, a refund or credit shall be allowed a distributor or a purchaser duly registered with or licensed by the taxing authorities of another state as a distributor of or a dealer in motor fuel therein, of the tax required to be paid pursuant to this article upon motor fuel in the amount of such tax paid by or included in the price paid by a distributor or such purchaser to the seller thereof if such fuel was exported from this state for sale outside this state and in connection with such exportation such fuel was immediately shipped to an identified facility outside this state provided the applicant complies with all requirements and rules and regulations of the tax commission, including evidentiary requirements, relating thereto; and provided further that upon receipt of a claim for refund in processible form, interest shall be allowed and paid at the rate set by the tax commission pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter from the due date of the return to the date immediately preceding the date of the refund check except no such interest shall be allowed or

paid if the refund check is mailed within thirty days of such receipt and except no interest shall be allowed or paid if the amount thereof would be less than one dollar.

"9. With respect to any organization described in paragraph four of subdivision (a) of section eleven hundred sixteen of this chapter which is eligible pursuant to this section for reimbursement of the tax required to be paid pursuant to this article, upon receipt of a claim for reimbursement in processible form, interest shall be allowed and paid at the rate set by the tax commission pursuant to subdivision twenty-sixth of section one hundred seventy-one of this chapter from the date of the application for reimbursement to the date immediately preceding the date of the reimbursement check except no such interest shall be allowed or paid if the reimbursement check is mailed within forty-five days of such receipt and except no interest shall be allowed or paid if the amount thereof would be less than one dollar. Provided, however, the department shall process applications for reimbursement as expeditiously as possible."

"§ 1101 (b) (4) (ii):

(ii) Notwithstanding the provisions of subparagraph (i) of this paragraph, no motor fuel shall be sold or used in this state without payment, and inclusion in the sales price of such motor fuel, of the tax on motor fuel required to be prepaid pursuant to the provisions of subdivisions (a) and (b) of section eleven hundred two of this article except where a provision of this article relating to motor fuel specifically provides otherwise and except in the

case of a sale or use subject to tax under section eleven hundred five or eleven hundred ten, respectively, of this article. Provided, however, except for such requirement of prepayment of tax required by such subdivisions of such section, the provisions of this subparagraph shall not otherwise modify the meaning of the term "retail sale" as used in this article. For purposes of this subparagraph and sections eleven hundred two, eleven hundred eleven, eleven hundred twenty, eleven hundred thirty-two, eleven hundred thirty-four, eleven hundred thirty-five, eleven hundred thirty-six and eighteen hundred seventeen of this chapter, the following terms shall have the following meanings:

"(A) "Automotive fuel" means diesel motor fuel as defined in section two hundred eighty-two-a of this chapter, other than kerosene or propane used for residential purposes, or motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter. The phrase "used for residential purposes" shall have the same meaning as it has for purposes of section eleven hundred five-A of this article.

"(B) The term "distributor" shall have the same meaning as it has for purposes of article twelve-A of this chapter, excluding persons who are not required pursuant to section two hundred eighty-two-a to pay the tax imposed thereby.

"(C) The term "motor fuel" means motor fuel as defined in subdivision two of section two hundred eighty-two of this chapter.

"(D) The terms "filling station" and "owner" shall have the same meaning as they have for the purposes of article twelve-A of this chapter."

"§ 1102. Prepayment of sales tax on motor fuel

(a) Every distributor shall pay, as a prepayment on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, a tax on each gallon of motor fuel (i) which he imports or causes to be imported into this state for use, distribution, storage or sale in the state or produces, refines, manufactures or compounds in this state or (ii) if the tax has not been imposed prior to its sale in this state, which he sells (which acts shall in regard to motor fuel hereinafter in this article be emcompassed by the phrase "imported, manufactured or sold"). The amount of such prepayment per gallon shall be computed pursuant to the provisions of subdivision (e) of section eleven hundred eleven of this article. No provision of this section shall apply or be construed to apply to foreign or interstate commerce except insofar as the same may be effective pursuant to the United States constitution and to the laws of the United States enacted pursuant thereto. Provided, further, no motor fuel shall be included in the measure of the tax under clause (i) of this subdivision unless it shall have previously come to rest within the meaning of federal decisional law interpreting the United States constitution.

"(b) The taxes required to be prepaid pursuant to this section shall be administered and collected in a like manner as the taxes imposed by sections eleven hundred five and eleven hundred ten of this article.

All the provisions of this article relating to or applicable to the administration, collection and disposition of the taxes imposed by such sections shall apply to the tax required to be prepaid under this section so far as such provisions can be made applicable to such prepayments of tax with such limitations as set forth in this article and such modifications as may be necessary in order to adapt such language to the tax so imposed, provided, however, that the provisions of paragraph one of subdivision (c) of section eleven hundred thirty-seven of this article and the reference in section eleven hundred thirty-seven-A of this article to such paragraph one of subdivision (c) of section eleven hundred thirty-seven shall not be applicable to such tax required to be prepaid under this section. Such provisions shall apply with the same force and effect as if the language of those provisions had been set forth in full in this section except to the extent that any provision is either inconsistent with a provision of this section or is not relevant to the tax required to be prepaid by this section. For purposes of this section, any reference in this article to the tax or taxes imposed by this article shall be deemed to refer to the tax required to be prepaid pursuant to this section unless a different meaning is clearly required. Provided, further, that, except as otherwise provided in subdivision (j) of section eleven hundred fifteen of this article and except as otherwise provided in paragraph five of subdivision (b) of section eleven hundred sixteen of this article, the exemptions provided in such sections (other than that provided in paragraph nine of subdivision (a) of such section eleven hundred fifteen with respect to purchases of kero-jet fuel) shall not apply to the tax required to be prepaid under this section.

"(c) Nothing in this article shall be construed to require the payment of the tax required to be prepaid pursuant to this section more than once upon motor fuel sold within the state. When the foregoing prepaid tax imposed pursuant to this section is paid it shall have been so paid on account of the taxes imposed by this article or pursuant to the authority of article twenty-nine of this chapter with respect to the retail sale or use of motor fuel. Nothing in this section shall modify or affect the taxes imposed by sections eleven hundred five and eleven hundred ten of this article as applied to receipts from the sale or use of motor fuel.

"(d) Deposit and disposition of revenue. (1) Consistent with sections eleven hundred forty-eight and twelve hundred sixty-one of this chapter, the taxes imposed pursuant to this section and interest and penalties thereon received by the tax commission, after deducting the amount which the commissioner of taxation and finance or his delegate shall determine to be necessary for reasonable costs of the tax commission in administering, collecting and distributing such taxes, shall be deposited daily with such responsible banks, banking houses or trust companies, as may be designated by the comptoller, to the credit of the comptroller. Of the total revenue collected or received under this section, the comptroller shall retain in his hands such amount as the commissioner of taxation and finance may determine to be necessary for refunds under this article and pursuant to the authority of article twenty-nine of this chapter.

"(2) On or before the twelfth day of each month, after reserving such amount for such refunds and

such costs, the commissioner of taxation and finance or his delegate shall certify to the comptroller the amount of all revenues so received during the prior month as a result of the taxes, interest and penalties so imposed and, in addition, on or before the last day of June and December the commissioner or delegate shall certify the amount of such moneys received during and including the first twenty-five days of said months. At the time he prepares such certification, the commissioner of taxation and finance or his delegate shall determine the receipts attributable to the amount of motor fuel sold at retail in each county and city and in the metropolitan commuter transportation district subject to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article and the like taxes imposed pursuant to the authority of article twenty-nine of this chapter and he shall certify the portion of such receipts from the total payments that represents the prepaid tax on account of the taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter (determined without regard to the taxes imposed by this section and any like taxes imposed pursuant to the authority of article twenty-nine of this chapter) based upon the retail sales or uses of such fuel in such jurisdiction or district. The amount of revenues so certified shall be deposited and distributed by the comptroller in accordance therewith. Where the amount so certified in any distribution is more or less than the amount due, the amount of the overpayment or underpayment shall be determined as soon after the discovery of the overpayment or underpayment as is reasonably possible and subsequent certifications to the comptroller shall be adjusted by subtracting the amount

of any such overpayment from or by adding the amount of any such underpayment to such number of subsequent payments as the comptroller and the new commissioner of taxation and finance shall consider reasonable in view of the amount of the overpayment or underpayment and all other pertinent facts and circumstances.

"(e) For the purposes of this section and section two hundred eighty-four of this chapter the term "use" shall mean, in addition to the meaning set forth in paragraph seven of subdivision (b) of section eleven hundred one of this article, the exercise of any right or power over motor fuel by any person, whether or not a purchaser, including, but not limited to, the receiving, the withdrawal from storage or any consumption of such motor fuel."

"§ 1132. Collection of tax from customer; proof required for registration of motor vehicles

* * *

"(c) For the purpose of the proper administration of this article and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts for property or services of any type mentioned in subdivisions (a), (b), (c) and (d) of section eleven hundred five, all rents for occupancy of the type mentioned in subdivision (e) of said section, and all amusement to tax until the contrary is established and the burden of proving that any receipt, amusement charge or rent is not taxable hereunder shall be upon the person required to collect tax or the customer. Except as provided in subdivision (h) of this section, unless (1) a vendor, not later than ninety days after delivery of the property

or the rendition of the service, shall have taken from the purchaser a certificate in such form as the tax commission may prescribe, signed by the purchaser and setting forth his name and address and, except as otherwise provided by regulation of the tax commission the number of his registration certificate together with such other information as said commission may require, to the effect that the property or service was purchased for resale or for some use by reason of which the sale is exempt from tax under the provisions of section eleven hundred fifteen, and, where the certificate requires the inclusion of the purchaser's registration certificate number or other identification number required by regulations of the tax commission, that the purchaser's certificate of authority has not been suspended or revoked and has not expired as provided in section eleven hundred thirty-four, or (2) the purchaser, not later than ninety days after delivery of the property or the rendition of the service, furnishes to the vendor: any affidavit, statement or additional evidence, documentary or otherwise which the tax commission may require demonstrating that the purchaser is an exempt organization described in section eleven hundred sixteen, the sale shall be deemed a taxable sale at retail. Where a certificate or document referred to in the previous sentence is received within the time limit set forth therein, but is deficient in some material manner, and where such deficiency is thereafter removed, the receipt of such certificate or document shall be deemed to have satisfied all of the requirements of the preceding sentence. Where such a certificate or statement has been furnished to the vendor, the burden of proving that the receipt, amusement charge or rent is not taxable hereunder shall be solely upon the customer. The

vendor shall not be required to collect tax from purchasers who furnish a certificate of resale, an exempt organization statement or other exemption certificate in proper form, unless, in the case of a certificate described in clause one of the second sentence of this subdivision whereon the purchaser's registration certificate number, or other identification number required by regulation of the tax commission, is required to be included, such purchaser's certificate of authority is invalid because it has been suspended or revoked as provided in section eleven hundred thirty-four and the tax commission has furnished registered vendors with information identifying those persons whose certificates of authority have been suspended or revoked, or unless such purchaser's certificate of authority is invalid because it has expired, and the tax commission has provided registered vendors with a means of determining whether such expiration has occurred. Where the vendor accepts such a certificate from a person identified by the tax commission as one whose certificate of authority has been suspended or revoked or from a person whose certificate of authority has been identified as having expired, the receipt, amusement charge or rent from such transaction shall be deemed to be a taxable sale at retail. Provided, however, the tax commission may authorize a purchaser, who acquires tangible personal property or services under circumstances which make it impossible at the time of acquistion to determine the manner in which the tangible personal property or services will be used, to pay the tax directly to the tax commission and waive the collection of the tax by the vendor. Subject to such reasonable conditions as the tax commission may require, the tax commission shall authorize an omnibus carrier described in subdivi-

sion (b) of section eleven hundred nineteen to pay the tax on the purchase or use of an omnibus directly to the tax commission and waive the collection of the tax by the vendor. No such authority shall be granted or exercised except upon application to the tax commission, and the issuance by the tax commission, in its discretion, of a direct payment permit. If a direct payment permit is granted, its use shall be subject to conditions specified by the tax commission, and the payment of tax on all acquisitions pursuant to the permit shall be made directly to the tax commission by the permit holder. The tax commission may suspend or revoke a direct payment permit where the permit holder fails to comply with any of the provisions of this article or any rule promulgated by the tax commission with respect to this article. The notice and hearing provisions applicable to the revocation and suspension of certificates of authority under section eleven hundred thirty-four shall apply to th suspension and revocation of direct payment permits. A vendor shall not be required to collect tax from a purchaser who furnishes a direct payment permit in proper form, unless such purchaser's direct payment permit has been suspended or revoked by the tax commission and the tax commission has provided registered vendors with information identifying those persons whose direct payment permits have been suspended or revoked. Where a vendor accepts a direct payment permit from a person whose direct payment permit has been suspended or revoked, and the tax commission has provided registered vendors with information identifying those persons whose direct payment permits have been suspended or revoked, the receipt, amusement charge or rent from such transaction shall be deemed to be subject to tax."

"§ 1134. Registration

(a) (1) (i) Every person required to collect any tax imposed by this article commencing business or opening a new place of business, (ii) every person purchasing or selling tangible personal property for resale commencing business or opening a new place of business, (iii) every person selling automotive fuel including persons who or which are not distributors, (iv) every person described in this subdivision who takes possession of or pays for business assets under circumstances requiring notification by such person to the tax commission pursuant to subdivision (c) of section eleven hundred forty-one of this chapter and (v) every person described in subparagraph (i), (ii), (iii) or (iv) who or which has had its certificate of authority revoked under paragraph four of this subdivision, shall file with the tax commission a certificate of registration, in a form prescribed by it, at least twenty days prior to commencing business or opening a new place of business or such purchasing, selling or taking of possession or payment, whichever comes first. Information with respect to the notice requirements of a purchaser, transferee or assignee and his liability for the payment of taxes pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter shall be included in or accompany the certificate of registration form furnished the applicant. The tax commission shall also include with such information furnished to each applicant general information about the tax imposed under this article including information on records to be kept, returns and payments, notification requirements and forms. Such certificate of registration may be amended in accordance with rules promulgated by the tax commission.

"(2) Except as otherwise provided in this section, the tax commission, within five days after receipt of a certificate of registration filed as provided for in paragraph one of this subdivision, shall issue, without charge, to each registrant a certificate of authority empowering him to collect the tax and a duplicate thereof for each additional place of business of such registrant. Such certificate of authority may be issued for a specified term of not less than three years, subject to renewal in accordance with rules promulgated by the tax commission. Whether or not such certificate of authority is issued for a specified term, such certificate shall be subject to suspension or revocation as provided for in this section. Each certificate or duplicate shall state the place of business to which it is applicable. Such certificate of authority or duplicate shall be prominently displayed in the place of business of the registrant to which it applies. A registrant who has no regular place of doing business shall attach such certificate to each of his carts, stands, trucks or other merchandising devices. Such certificates of authority and any duplicate shall be nonassignable and nontransferable and shall be surrendered to the tax commission immediately upon the registrant's ceasing to do business at the place named (unless the registrant amends his certificate of registration in accordance with rules promulgated by the tax commission) or in the event that such business never commenced.

"(3) A person, other than one described in clauses (A), (B) and (C) of paragraph (8) of subdivision (b) of section eleven hundred one, but who makes sales to persons within the state of tangible personal property or services, the use of which is subject to tax under this article, may if he so elects

file a certificate of registration with the tax commission which may, in its discretion and subject to such conditions as it may impose, issue to him a certificate of authority to collect the compensating use tax imposed by this article.

"(4) (A) Where a person who holds a certificate of authority (i) willfully fails to file a report or return required by this article, (ii) willfully files, causes to be filed, gives or causes to be given a report, return, certificate or affidavit required under this article which is false, (iii) willfully fails to comply with the provisions of paragraph two or three of subdivision (e) of section eleven hundred thirty-seven of this article, (iv) willfully fails to collect, truthfully account for or pay over any tax imposed under this article or pursuant to the authority of article twenty-nine of this chapter, or (v) has been convicted of a crime provided for in this chapter, the tax commission may revoke or suspend such certificate of authority and all duplicates thereof. Provided, however, that the tax commission may revoke or suspend a certificate of authority based on the grounds set forth in clause (v) of this subparagraph only where the conviction referred to occurred not more than one year prior to the date of revocation or suspension.

"(B) Where a person files a certificate of registration for a certificate of authority under this subdivision and in considering such application the tax commission ascertains that (i) any tax imposed under this chapter or any related statute, as defined in section eighteen hundred of this chart, has been finally determined to be due from such person and has not been paid in full, (ii) a tax due under this article or any law, ordinance or resolution enacted

pursuant to the authority of article twenty-nine of this chapter has been finally determined to be due from an officer, director, partner or employee of such person in his capacity as a person required to collect tax on behalf of such person or another person and has not been paid, (iii) such person has been convicted of a crime provided for in this chapter within one year from the date on which such certificate of registration is filed, (iv) an officer, director, partner or employee of such person, which officer, director, partner or employee is a person required to collect tax on behalf of such person filing a certificate of registration has in his capacity as a person required to collect tax on behalf of such person or of another person been convicted of a crime provided for in this chapter within one year from the date on which such certificate of registration is filed, (v) a shareholder owning more than fifty percent of the number of shares of stock of such person (where such person is a corporation) entitling the holder thereof to vote for the election of directors or trustees, who owned more than fifty percent of the number of such shares of another person (where such other person is a corporation) at the time any tax imposed under this chapter or any related statute as defined in section eighteen hundred of this chapter was finally determined to be due and where such tax has not been paid in full, or at the time such other person was convicted of a crime provided for in this chapter within one year from the date on which such certificate of registration is filed, or (vi) a certificate of authority issued to such person has been revoked or suspended pursuant to subparagraph (A) of this paragraph within one year from the date on which such certificate of registration is filed, the tax commission may refuse to issue a certificate of authority.

"(C) In any of the foregoing instances where the tax commission may suspend or revoke or refuse to issue a certificate of authority, the tax commission may condition the retention or issuance of a certificate of authority upon the filing of a bond or the deposit of tax in the manner provided in paragraph two or three of subdivision (e) of section eleven hundred thirty-seven.

"(D) Notice of proposed revocation, suspension or refusal to issue shall be given to the person holding a certificate of authority issued pursuant to this subdivision or to a person applying for such a certificate in the manner prescribed for a notice of determination of tax and all the provisions of this article applicable to a notice of determination under section eleven hundred thirty-eight shall apply to a notice issued pursuant to this paragraph, insofar as such provisions can be made applicable to the notice authorized by this paragraph, with such modifications as may be necessary in order to adapt the language of such provisions to the notice authorized by this paragraph. In the case of a person applying for a certificate of authority a notice of proposed refusal to issue shall be issued within five days after timely registration pursuant to paragraph one of subdivision (a) of this section. Upon timely application therefor, a hearing shall be scheduled and within three months from such application for hearing (determined with regard to any postponements of any scheduled hearing or conference made at the request of the applicant) the tax commission shall issue either a notice of refusal or a certificate of authority. If the tax commission fails to issue a notice of refusal within such three month period (or such period as extended pursuant to this subdivision), the tax commission shall im-

mediately upon the conclusion of such period issue a certificate of authority to the applicant. Such notice of proposed revocation or suspension must be given to such person within three years from the date of the act or omission described in subparagraph (A) of this paragraph, except that in the case of acts involving falsity or fraud, such notice may be issued at any time. All of such notices shall contain a statement advising the person to whom it is issued that the suspension, revocation or refusal to issue may be challenged through a hearing process and that the petition for such challenge must be filed with the tax commission within ninety days after the giving of such notice.

"(E) After the tax commission has suspended or revoked a person's certificate of authority, by a notice of suspension or revocation, or has refused to issue a certificate of authority, by a notice of refusal, to such person and such decision has become final as provided for in this pragraph, or after a person's certificate of authority has expired and such person has failed to renew such certificate or obtain a new certificate of authority, such person is prohibited from engaging in any business in this state for which a certificate of authority is required. If despite such prohibition such person continues to be so engaged in business, the tax commission may bring an action to enjoin such person from so engaging in business.

"(5) If the tax commission considers it necessary for the proper administration of the sales and use taxes imposed by this article and pursuant to the authority of article twenty-nine of this chapter, it may require every person under this section or section twelve hundred fifty-three of this chapter who

holds a certificate of authority to file a new certificate of registration in such form and at such time as the tax commission may prescribe and to surrender such certificate of authority. The tax commission may require such filing and such surrender not more often than once every three years. Upon the filing of such certificate of registration and the surrender of such certificate of authority, the tax commission shall issue, within such time as it may prescribe, a new certificate of authority, without charge, to each registrant and a duplicate thereof for each additional place of business of such registrant.

"(b) (1) Every promoter of a show shall, at least ten days prior to the opening of such show, file with the tax commission a notice stating the location and dates of such show, in a form prescribed by the tax commission.

"(2) The tax commission shall, within five days after the receipt of any such notice, issue to the promoter, without charge, a permit to operate such show, except as provided by paragraph five of this subdivision. No promoter shall rent, lease or grant a license to use space for a show or operate a show without obtaining such permit. Such permit shall be prominently displayed at the main entrance to the show. However, if a notice required under paragraph one has been properly filed, and if a permit has not been received by the promoter prior to the opening of the show, the requirements contained in this subdivision with respect to obtaining and displaying such a permit shall be deemed to have been complied with, unless and until the promoter receives a notice from the tax commission, sent by registered or certified mail, denying the ap-

plication for a permit based on the existence of an order previously issued under paragraph five of this subdivision and in effect as of the date of issuance of such notice denying the application. An applicant shall have a right to a hearing before the tax commission to contest such a notice of denial. If a permit is received after a show has commenced but before it has been terminated, the promoter must commence to display such permit as provided for in this paragraph.

"(3) Any promoter who is a "person required to collect any tax imposed by this article" as defined in subdivision one of section eleven hundred thirty-one, shall comply with all of the provisions of this article relating to such persons as well as with all of the provisions of this article relating to promoters.

"(4) A promoter shall not permit any person to display for sale or to sell tangible personal property or services subject to tax at a show unless such person is registered under subdivision (a) of this section and displays his certificate of authority in accordance with the provisions of such subdivision.

"(5) Any promoter who fails to file a notice of a show, operates a show without a permit, fails to file a report of a show, files a report which is wilfully false, or fails to comply with any provision contained in this article or any regulation promulgated by the tax commission pertaining to shows shall, after an opportunity for a hearing has been afforded, be subject to the revocation of all existing permits issued, pursuant to this section, to operate a show. The state tax commission may, after an opportunity for a hearing has been afforded, also issue an order denying such promoter a permit to

operate a show for a period of not more than six months from the date of such order. Such penalties shall be in addition to any penalties imposed pursuant to subdivision (b) of section eleven hundred forty-five."

"§ 1135. Records to be kept

(a) Every person required to collect tax shall keep records of every sale or amusement charge or occupancy and of all amounts paid, charged or due thereon and of the tax payable thereon, in such form as the tax commission may by regulation require. Such records shall include a true copy of each sales slip, invoice, receipt, statement or memorandum upon which subdivision (a) of section eleven hundred thirty-two requires that the tax be stated separately.

"(b) Every promoter shall keep a record of the date and place of each show and the name, address and certificate of authority number of every person whom he permits to display for sale or to sell tangible personal property or services subject to tax at such show.

"(c) Ever person selling or holding large volumes of automotive fuel shall keep records for such periods and in the manner prescribed by the tax commission pursuant to rules and regulations. Such records shall show (1) the number of gallons of automotive fuel purchased, the price paid therefor, the amount of tax paid pursuant to the provisions of section eleven hundred two of this article and the regional average retail sales price applicable thereto and (2) the number of gallons sold, and the price paid by the purchaser to whom such

person sells the automotive fuel, and the amount of tax included in such price pursuant to the provisions of section eleven hundred two of this article and the regional average retail sales price or the amount of tax collected pursuant to the provisions of subdivision (a) of section eleven hundred five of this article applicable to such sale together with such additional information as the tax commission shall require. The regional average retail sales price, and the amount of tax shall be calculated in the manner set forth in section eleven hundred eleven of this article.

"(d) Such records shall be available for inspection and examination at any time upon demand by the tax commission or its duly authorized agent or employee and shall be preserved for a period of three years, except that the tax commission may consent to their destruction within that period or may require that they be kept longer. Such records may be kept within the meaning of this section when reproduced on any photographic, photostatic, microfilm, micro-card, miniature photographic or other process which actually reproduced the original record."

"§ 1136. Returns

(a) Every person required to register with the tax commission as provided in section eleven hundred thirty-four whose taxable receipts, amusement charges and rents total less than three hundred thousand dollars, or in the case of any such person whose sales of automotive fuel total less than one hundred thousand gallons, in every quarter of the preceding four quarters shall only file a return quarterly with the tax commission and every person

required to so register whose taxable receipts, amusement charges and rents total three hundred thousand dollars or more, or in the case of any such person whose sales of automotive fuel total one hundred thousand gallons or more in any quarter of the preceding four quarters shall, in addition to filing a quarterly return, and except as otherwise provided in section eleven hundred two of this article, file either, a long-form or short-form, part-quarterly return monthly with the tax commission. However, a person required to register only because he is purchasing or selling tangible personal property for resale, and who is not required to collect any tax or pay any tax directly to the tax commission under this article, shall file an information return annually in such form as the tax commission may prescribe, or in the case of a person, who or which is not a distributor, required to register because he is selling automotive fuel, shall file an information return quarterly or, if the tax commission deems necessary, monthly, in such form as the tax commission shall prescribe. The return of a vendor of tangile personal property or services shall show his receipts from sales and also the aggregate value of tangible personal property and services sold by him, the use of which is subject to tax under this article, and the amount of tax payable thereon pursuant to the provisions of section eleven hundred thirty-seven. The return of a recipient of amusement charges shall show all such charges and the amount of tax thereon, and the return of an operator required to collect tax on rents shall show all rents received or charged and the amount of tax thereon. The returns of any seller of automotive fuel shall show the number of gallons of automotive fuel sold, together with such additional information as the tax commission shall require in

order to certify the amount of taxes, penalties and interest payable to local taxing jurisdictions imposed on the sale or use of automotive fuel pursuant to the provisions of section twelve hundred sixty-one of this chapter. Taxable receipts as used in this section shall mean and include taxable receipts from the sale of automotive fuel and any receipts from the sale of motor fuel in this state whether or not such receipts are subject to the taxes imposed by section eleven hundred two, eleven hundred five or eleven hundred ten of this article and regardless of whether the provisions of section eleven hundred twenty of this article are applicable to the taxes imposed in respect of such receipts.

"(i) For purposes of this article the term "long-form, part-quarterly return" shall mean a return in a form determined by the tax commission providing for the calculation of the actual sales and compensating use taxes for the preceding month in the manner set forth in subdivisions (a) and (b) of section eleven hundred thirty-seven. A person filing a long-form, part-quarterly return for each of the months contained in a quarter shall also be required to file a quarterly return for such quarter.

"(ii) For purposes of this article the term "short-form, part-quarterly return" shall mean a return which shall be available for use in filing as a return for the first two months of any quarter and only by a person required to file a return monthly who has had at least four successive quarterly tax periods immediately preceding the month for which the return is to be filed and who elects such use, and is in a form determined by the tax commission and providing for the calculation of one-third of the total state and local sales and compensating use

taxes paid by the person to the tax commission in the comparable quarter of the immediately preceding year under this article and as taxes imposed pursuant to the authority of article twenty-nine with respect to all receipts, amusement charges and rents.

"(b) The returns and information returns required by this section to be filed quarterly shall be filed for quarterly periods ending on the last day of February, May, August and November of each year, and each return and each information return shall be filed within twenty days after the end of the quarterly period covered thereby. The returns required by this section to be filed monthly shall be filed for monthly periods ending on the last day of each month and each return shall be filed within twenty days after the end of each prior month. The information returns required to be filed annually shall be filed for twelve month periods ending on the last day of May of each year, and each such information return shall be filed within twenty days after the end of the twelve month period covered thereby.

"(c) The tax commission may permit or require returns to be made covering other periods and upon such dates as it may specify. If the tax commission deems it necessary in order to insure the payment of the taxes imposed by this article, it may require returns to be made for shorter periods than those prescribed pursuant to the foregoing subdivisions of this section, and upon such dates as it may specify.

"(d) The form of returns shall be prescribed by the tax commission and shall contain such informa-

tion as it may deem necessary for the proper administration of this article. The commission may require amended returns to be filed within twenty days after notice and to contain the information specified in the notice.

"(e) The tax commission may by regulation require lessors as defined in paragraph (8) of subdivision (d) of section eleven hundred one to file information returns showing all leases, subleases and licenses to use granted to persons who make amusement charges, and may prescribe the form of such returns, the time when they are to be filed and the information to be contained therein.

"(f) Every promoter shall file a report monthly, within twenty days after the end of the prior month, for all shows with respect to which he was a promoter in such prior month, listing the date and place of each show and the name, address and certificate of authority number, by show, of every person whom he permitted to display for sale or to sell tangible personal property or services subject to tax at such show. Every person shall furnish the promoter of any show at which he displays for sale or sells tangible personal property or services subject to tax, with a statement of his name, address and certificate of authority number for the promoter's use in filing the report required herein."

"§ 1137. Payment of tax

(a) Every person required to file a return under the preceding section whose total taxable receipts, amusement charges and rents are subject to the tax imposed pursuant to subdivisions (a), (c), (d), (e) and (f) of section eleven hundred five of this article

shall, at the time of filing such return, pay to the tax commission the total of the following:

"(i) Four percent of the total of all receipts, amusement charges and rents subject to tax under this article, and if any of such receipts, amusement charges and rents are subject to local tax imposed pursuant to article twenty-nine of this chapter, an additional percentage of the total thereof equal to the percentage rate of such local tax;

"(ii) All taxes imposed by section eleven hundred ten or pursuant to article twenty-nine of this chapter upon such person's use of property or services; and

"(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected.

"(b) Every person required to file a return under the preceding section and not subject to the provisions of subdivision (a) of this section shall, at the time of filing such return, pay to the tax commission the taxes imposed by this article and pursuant to article twenty-nine as well as all other moneys collected by such person acting or purporting to act under the provisions of this article or of any local law, ordinance or resolution adopted pursuant to article twenty-nine; provided, however, that if the

tax commission shall have fixed an effective rate of tax applicable to any or all of his receipts, amusement charges and rents as provided in subdivision (d) of this section, any such person may elect, with reference to such receipts, amusement charges and rents and subject to approval by the tax commission and to such regulations as it may promulgate, to pay to said commission at the time of filing his return the total of the following:

"(i) The percentage of such receipts, amusement charges and rents fixed by the tax commission as the effective rate of tax applicable thereto;

"(ii) All taxes imposed by section eleven hundred ten or pursuant to article twenty-nine of this chapter upon such person's use of property or services; and

"(iii) All moneys collected by such person, purportedly as tax imposed by this article or pursuant to article twenty-nine, with respect to any receipt, amusement charge or rent not subject to tax, and all moneys collected with respect to any receipt, amusement charge or rent subject to tax, purportedly in accordance with a schedule prescribed by the tax commission but actually in excess of the amount stated in such schedule as the amount to be collected; and

"(iv) The amount of the taxes imposed by this article and pursuant to article twenty-nine with respect to all receipts, amusement charges and rents as to which no effective rate of tax fixed by the tax commission is applicable.

"(c)(1) The provisions of subdivisions (a) and (b) of this section shall not be applicable to: (i) a person filing a short-form, part-quarterly return as defined in paragraph (ii) of subdivision (a) of section eleven hundred thirty-six hereof, who, at the time of such filing shall pay to the tax commission one-third of the total state and local sales and compensating use taxes payable by the person to the tax commission in the comparable quarter of the immediately preceding year under this article and as taxes imposed pursuant to the authority of article twenty-nine with respect to all receipts, amusement charges and rents, or (ii) a person filing a March estimated return as described in paragraph (ii) of subdivision (c) of section eleven hundred thirty-seven-A hereof who, at the time of such filing shall pay to the tax commission one-third of the sales and compensating use taxes payable by such person to the tax commission in the comparable quarter of the immediately preceding year under this article. Notwithstanding the preceding sentence, for the purposes of subparagraph (ii) of this paragraph, the sales and compensating use taxes payable in the comparable quarter of the immediately preceding year shall not include taxes imposed by section eleven hundred seven or eleven hundred eight of this article or pursuant to the authority of article twenty-nine of this chapter."

"(2) The provisions of subdivisions (a) and (b) of this section, however, shall apply to a person filing a March estimated return as described in paragraph (i) of subdivision (c) of section eleven hundred thirty-seven-A hereof who, at the time of such filing shall pay to the tax commission the sales and compensating use taxes, that are estimated to be payable by such person for such month of March.

Notwithstanding the preceding sentence, for the purposes of this paragraph, the sales and compensating use taxes that are estimated to be payable by such person for such month of March shall not include taxes imposed by section eleven hundred seven or eleven hundred eight of this article or pursuant to the authority of article twenty-nine of this chapter.

"(d) The tax commission is hereby authorized to fix the effective rate of tax applicable to any or all of the taxable receipts, amusement charges and rents of any person required to collect tax, or of any group or classification of such persons. Any effective rate so fixed shall be fixed at such a percentage rate as to require, so far as practicable, payment of an amount equal to the total taxes imposed by this article and pursuant to article twenty-nine.

"(e) (1) The amount so payable to the tax commission for the period for which a return is required to be filed shall be due and payable to the tax commission on the date limited for the filing of the return for such period, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of receipts, amusement charges or rents or the value of property or services sold or purchased or the taxes due thereon.

"(2) Where the tax commission, in its discretion, deems it necessary to protect the revenues to be obtained under this article, it may require any person required to collect any tax imposed by this article to file with it a bond, issued by a surety company authorized to transact business in this state and approved by the superintendent of insurance of this

state as to solvency and responsibility or other security acceptable to the tax commission, in such amount as the tax commission may fix, to secure the payment or payment over of any tax, penalties or interest due or which may become due from such person under this article. In the event that the tax commission determines that such person is to file such bond or other security, it shall give notice to him to that effect specifying the amount of the bond or other security required. Such person shall file such bond or other security within thirty days after the giving of such notice unless within five days after the giving of such notice he shall request, in writing, a hearing before the tax commission at which the necessity, propriety and amount of the bond or other security shall be determined by the tax commission. Such determination shall be final and shall be complied with within thirty days after the giving of notice thereof. If securities are deposited as security under this paragraph, such securities shall be kept in the custody of the commissioner of taxation and finance and may be sold by the tax commission if it becomes necessary so to do in order to recover any sums due from such person pursuant to this article, but no such sale shall be had until after such person shall have had opportunity to litigate the validity of any tax if he elects so to do. Upon any such sale, the surplus, if any, above the sums due under this article shall be returned to such person.

"(3) As an additional or alternate requirement, whenever any person fails to collect, truthfully account for, pay over the tax, or file returns of the tax as required in this article, the tax commission, in its discretion where it deems necessary to protect the revenues to be obtained under this article, may give

notice requiring such person to collect the taxes which become collectible after the giving of such notice, to deposit such taxes in any banking institution approved by the tax commission and located in this state the deposits in which are insured by any agency of the federal government, in a separate account, in trust for any payable to the tax commission, and to keep the amount of such tax in such account until payment over to the tax commission. Such notice shall remain in effect until a notice of cancellation is given by the tax commission."

"§ 1139. Refunds

(a) In the manner provided in this section the tax commission shall refund or credit any tax, penalty or interest erroneously, illegally or unconstitutionally collected or paid if application therefor shall be filed with the tax commission (i) in the case of tax paid by the applicant to a person required to collect tax, within three years after the date when the tax was payable by such person to the tax commission as provided in section eleven hundred thirty-seven, or (ii) in the case of a tax, penalty or interest paid by the applicant to the tax commission, within three years after the date when such amount was payable under this article, or (iii) in the case of a tax due from the seller, transferor or assignor and paid by the applicant to the tax commission where the applicant is a purchaser, the transferee or assignee liable for such tax pursuant to the provisions of subdivision (c) of section eleven hundred forty-one of this chapter, within two years after the giving of notice by the tax commission to such purchaser, transferee or assignee of the total amount of any tax or taxes which the state claims to be due from the seller, transferor or assignor. Such

application shall be in such form as the tax commission shall prescribe. No refund or credit shall be made to any person of tax which he collected from a customer until he shall first establish to the satisfaction of the tax commission, under such regulations as it may prescribe, that he has repaid such tax to the customer. Notwithstanding any other provision of this article, if the time to file an application for refund or credit of any tax, penalty or interest would otherwise have expired on or before December nineteenth, nineteen hundred sixty-nine, the time for filing such application is hereby extended to and including December twentieth, nineteen hundred sixty-nine, except that it shall be further extended, as provided in subdivision (c) of section eleven hundred forty-seven, where a taxpayer has consented in writing to the extension of the period for assessment of additional tax.

"(b) If an application for refund or credit is filed with the tax commission as provided in subdivision (a) of this section, the tax commission may grant or deny such application in whole or in part and shall notify the taxpayer by mail accordingly. Such determination shall be final and irrevocable unless the applicant shall, within ninety days after the mailing of notice of such determination, apply to the tax commission for a hearing. After such hearing, the tax commission shall mail notice of its determination to the applicant. Such determination after a hearing may be reviewed by a proceeding pursuant to article seventy-eight of the civil practice law and rules, provided such proceeding is instituted within four months after the giving of the notice of such determination, and provided that a final determination of tax due was not previously

made. Such a proceeding shall not be instituted unless an undertaking is filed with the tax commission in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

"(c) A person shall not be entitled to a refund or credit under this section of a tax, interest or penalty which had been determined due pursuant to the provisions of section eleven hundred thirty-eight where he has had a hearing or an opportunity for a hearing, as provided in said section, or has failed to avail himself of the remedies therein provided. However, a person filing with the tax commission a signed statement in writing, as provided in subdivision (c) of section eleven hundred thirty-eight, before a determination assessing tax pursuant to subdivision (a) of section eleven hundred thirty-eight is issued, shall, nevertheless, be entitled to apply for a refund or credit pursuant to subdivisions (a) and (b) of this section, as long as such application is made within the time limitation set forth in such subdivision (a) or within two years of the date of payment of the amount assessed in accordance with the consent filed, whichever is later, but such application shall be limited to the amount of such payment. No refund or credit shall be made of a tax, interest or penalty paid after a determination by the tax commission made pursuant to section eleven hundred thirty-eight unless it be found that such determination was erroneous, illegal or unconstitutional or otherwise improper, by the tax commission after a hearing or of its own motion, or in a proceeding under article seventy-eight of the

civil practice law and rules, pursuant to the provisions of said section, in which event refund or credit shall be made of the tax, interest or penalty found to have been overpaid.

"(d) Except in respect to an overpayment made on a return described in paragraph (ii) of subdivision (a) of section eleven hundred thirty-six hereof or on a return described in subdivision (c) of section eleven hundred thirty-seven-A, interest shall be allowed and paid upon any refund made or credit allowed pursuant to this section except as otherwise provided in subdivision (e) of this section and except that no interest shall be allowed or paid if the amount thereof would be less than one dollar. Such interest shall be at the rate set by the tax commission pursuant to section eleven hundred forty-two, or if no rate is set, at the rate of six per cent per annum from the date when the tax, penalty or interest refunded or credited was paid to a date preceding the date of the refund check by not more than thirty days, provided, however, that for the purposes of this subdivision any tax paid before the last day prescribed for its payment shall be deemed to have been paid on such last day. In the case of a return of tax which is filed after the last date prescribed for filing such return (determined with regard to extensions), no interest shall be allowed or paid for any day before the date on which the return is filed. For purposes of this subdivision, a return shall not be treated as filed until it is filed in processible form. A return is in a processible form if such return is filed on a permitted form, and such return contains the taxpayer's name, address, and identifying number and the required signatures, and sufficient required information (whether on the return or on required attachments) to permit

the mathematical verification of tax liability shown on the return.

"(e) The provisions of subdivisions (a), (b) and (c) of this section shall be applicable to applications for refund or credit pursuant to section eleven hundred nineteen and subdivision (e) of section eleven hundred thirty-two, except that an application for credit may be made as provided in such section or subdivision and except that no interest shall be allowed or paid upon any refund made or credit allowed pursuant to such section or such subdivision.

"(f) Where a consumer returns a motor vehicle to and receives a refund of the full purchase price, capitalized cost or a portion thereof from the manufacturer in accordance with the provisions of section one hundred ninety-eight-a of the general business law, the tax commission shall refund to such consumer any tax paid by the consumer on the amount of the purchase price, capitalized costs and fees and charges refunded by the manufacturer which is not in excess of the receipts and proportionate to the receipts subject to tax. All the provisions of this section shall apply to the refund authorized by this subdivision, provided, however, that a request for a refund under this subdivision shall be timely made if such request for a refund is made within three years of the date the refund from the manufacturer is received by a consumer pursuant to subdivision (c) of section one hundred ninety-eight-a of the general business law and further provided that interest allowable under subdivision (d) of this section shall be payable from the date which is three months after the date the application for refund in processible form is received."